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SUPREME COURT OF THE UNITED STATES

CASE NO._____

October 1986 Term

RICHARD L. DUGGER,
Secretary, Florida Department
of Corrections,

Petitioner,

v.

VERNON RAY COOPER,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

AND APPENDIX

ROBERT A. BUTTERWORTH
FLORIDA ATTORNEY GENERAL

MARK C. MENSER
Assistant Attorney General
The Capitol
Tallahassee, FL 32301
(904) 488-0600

COUNSEL FOR PETITIONER

154 pp

QUESTIONS PRESENTED FOR REVIEW

ISSUE I

WHEN A STATE SUPREME COURT EXPRESSLY AND DIRECTLY STATES THAT IT HAS NOT RULED ON THE MERITS OF A PROCEDURALLY BARRED CLAIM, IS THE FEDERAL CIRCUIT COURT OF APPEALS EMPOWERED TO ADDRESS THE MERITS OF THE PROCEDURALLY BARRED CLAIM BY HOLDING THAT THE STATE SUPREME COURT WAS INCORRECT IN ITS ASSESSMENT OF ITS OWN ACTIONS.

ISSUE II

WHEN A LITIGANT DELIBERATELY WITHHOLDS EVIDENCE FROM A STATE COURT AFTER BEING GRANTED A FULL EVIDENTIARY HEARING PER TOWNSEND V. SAIN, SHOULD A FEDERAL CIRCUIT COURT ORDER A FEDERAL EVIDENTIARY HEARING TO PERMIT THE LITIGANT TO PRESENT HIS WITHHELD EVIDENCE.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

OPINIONS BELOW

The opinion of the Eleventh Circuit Court of Appeals is reported at 807 F.2d 881 (11th Cir. 1986) and appears in the appendix at A-6 (pp.A-101). That court's order denying rehearing appears at A-7 (pp.A-123). The opinion of the United States District Court appears in the appendix at A-5 (pp.A-96). The two relevant opinions of the Florida Supreme Court are reported in Cooper v. State, 336 So.2d 1133 (Fla. 1976) cert. denied, 431 U.S. 925, 97 S.Ct. 2200, 53 L.Ed.2d 239 (1977) and Cooper v. State, 437 So.2d 1070 (Fla. 1983) cert. denied, 464 U.S. 1073, 104 S.Ct. 986, 79 L.Ed.2d 221 (1984) and may be found at A-1 (pp.A-1) and A-3 (pp.A-36) respectively.

JURISDICTIONAL STATEMENT

The decision of the Circuit Court of Appeals was rendered on December 19, 1986. A Petition for Rehearing and Suggestion for Rehearing En Banc were timely filed on January 6, 1987 and denied on January 27, 1987. (App. 7).

This Honorable Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY

PROVISIONS INVOLVED

Article IV of the United States Constition provides:

ARTICLE IV

> Section 1. Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effort thereof.

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken

for public use without just compensation.

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

The Fourteenth Amendment to the United States Constitution provides:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the

equal protection of the laws.

Rules 17(1)(a) and (c) of the Supreme Court of the United States provide:

> Rule 17. Considerations governing review on certiorari
>
> 1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.
>
> (a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision. . . .
>
> (c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal

question in a way in conflict with applicable decisions of this Court.

In 28 U.S.C. §2254(d) provides:

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdicion in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit-

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due

proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, as shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court as erroneous.

STATEMENT OF THE CASE

For the purpose of addressing the precise legal issues raised in this petition, the Petitioner will rely upon the statement of the case and facts set forth in the December 19, 1986, panel decision in Cooper v Wainwright, 807 F.2d 881 (11th Cir. 1986) (appendixed), with one exception.

While in state court, the Respondent was afforded a full and fair evidentiary hearing (as required by Townsend v. Sain, 372 U.S. 293 (1963)) and elected not to present any evidence pertaining to his "Lockett" claim. Instead, the Respondent relied upon the state court record developed during the original trial and sentencing proceedings held in 197 .

The Eleventh Circuit Court of Appeal, reversing the district court ordered a federal evidentiary hearing to allow the

Respondent to present witnesses or evidence on the Lockett issue that he withheld from the state courts.

REASONS FOR GRANTING THE WRIT

IT IS SUGGESTED THAT CERTIORARI SHOULD BE GRANTED TO REVIEW THE CIRCUIT COURTS ARBITRARY DECISION TO IGNORE PRIOR DECISIONS OF THIS COURT AND OTHER CIRCUIT COURTS AND TO SUBSTITUTE ITS OWN CONCLUSIONS FOR THE FLORIDA SUPREME COURT'S STATEMENT REGARDING ITS DISPOSITION OF THIS CASE.

The Supreme Court of the State of Florida, in Cooper v. State, 437 S.2d 1070 (Fla. 1983) (hereafter "Cooper-II") specifically held that Mr. Cooper failed to raise the issue of his "federal constitutional right" to present non-statutory mitigating evidence in his direct appeal, so that the Florida Supreme Court, in turn, did not decide the issue on federal constitutional grounds. This basic statement of Florida's invocation of the "abstention doctrine", as recognized in Railroad Commission of Texas v. Pullman Co., 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed.2d 971 (1941), stands as the definitive and

controlling last word as to "how" the Supreme Court of Florida reached its decision.

The Eleventh Circuit, in an action which publicly questions the veracity of the justices of Florida's Supreme Court, has replaced the court's (binding) statement with its own. The Circuit Court stated that the Florida Supreme Court "did" consider the federal constitutional question despite representing that it did not do so.

This action stands in express conflict with this Honorable Court's decision in Wainwright v. Goode, 464 U.S. 78, 78 .Ed.2d 187, 104 S.Ct. 378 (1983). In a closely analogous circumstance, this Court held:

> "The difficulty with all of this is that the Florida Supreme Court had concluded that the trial judge had not improperly relied on future dangerousness in imposing the death penalty. If the interpretation of the trial judge's

remarks is deemed a legal issue, it is surely an issue of state law that the Court of Appeals should have accepted, since the views of the State's highest court with respect to state law are binding on the federal courts. See, e.g., Brown v. Ohio, 432 U.S. 161, 167, 53 L.Ed.2d 187, 97 S.Ct. 2221 (1971); Garner v. Louisiana, 368 U.S. 157, 169, 7 L.Ed.2d 207, 82 S.Ct. 248 (1961). If the Florida Supreme Court's conclusion that the death sentence was consistent with state law is accepted, the consitutional violation found by the Court of Appeals dissolves.

If, on the other hand, the issue of whether the sentencing judge relied upon future dangerousness in imposing the death sentence is characterized as an issue of historical fact to be decided on the transcript of the judge's remarks at the sentencing proceeding, we are convinced that the Court of Appeals failed to give proper weight to the state court's resolution of this factual issue". Id., at 84, 85.

The decision of the Supreme Court of Florida, as a matter of comity if not constitutional right, is entitled to the respect recognized in Goode, id, and even as recognized in Ford v Strickland 696 F.2d

804 (11th Cir. 1983).

The action of the Eleventh Circuit could fairly be characterized as a paternalistic exercise in ad hoc decision making. To recognize, in Ford, the finality of a state court decision and then, in this case, to arbitrarily and capriciously reject same is to lend an unconstitutional air of uncertainty to capital, or even criminal, proceedings as abhorred by Furman v. Georgia, 408 U.S. 238 (1972). Indeed, were the state courts to engage in this wholly unpredictable practice, the very constitutionality of our statute would be called into question.

Thus, as an adjunct to the argument that certiorari should be granted due to and direct conflict between the decision at bar and Goode, a special and important reason for granting certiorari exists. As this issue and the succeeding issue point

out, we have a fully constitutional statute, administered by the State in an accepted, constitutional manner, being subjected to the vagaries of arbitrary, ad hoc decision making by an intervening federal court. To promote the constitutional rights (guarantees) of both the defendant and the state (which is also entitled to justice, see Snyder . Massachussetts, 291 U.S. 97, 122 (1934) and to impose upon the Eleventh Circuit the judicial restraint called for in Sumner v. Mata, 455 U.S. 591 (1982), relief from this court is necessary.

The "bottom line" remains, however, that the Eleventh Circuit has not ruled upon this issue in a manner consistent with this Court's decisional law. Pursuant to Rule 17, therefore, it is suggested that certiorari should be granted.

ISSUE II

IT IS SUGGESTED THAT CERTIORARI SHOULD BE GRANTED TO DETERMINE THE ISSUE OF WHETHER AN APPLICANT FOR FEDERAL HABEAS CORPUS RELIEF SHOULD BE AWARDED AN EVIDENTIARY HEARING IN DISTRICT COURT FOR THE PURPOSE OF PRESENTING EVIDENCE HE INEXCUSEABLY WITHHELD FROM THE STATE COURT WHEN GIVEN AN EVIDENTIARY HEARING THERE.

Section 2254(d), drawing upon the wisdom of this Honorable Court's decision in Townsend v. Sain, 372 U.S. 293, 9 L.Ed.2d 770, 83 S.Ct. 745 (1963), set forth the considerations involved in granting or denying an evidentiary hearing in federal habeas corpus cases. As this Honorable Court made clear in Townsend, however:

> "If, for any reason not attributable to the inexcuseable negligence of petitioner, see Fay v. Noia, 9 L.Ed.2d 868 (Part V), evidence crucial to the adequate consideration of the constitutional claim was not developed at the state hearing, a federal hearing is compelled. The standard of inexecuseable default set down in Fay v. Noia adequately protects the legitimate state

> criminal procedure, for it does not sanction needless piecemeal presentation of constitutional claims in the forms of deliberate bypassing of state procedures". Id., at U.S. 317. (emphasis added).

The obvious impact of the Townsend decision upon our case is that the decision to approve Mr. Cooper's "deliberate bypass" of state procedures, to sanction "needless piecemeal litigation" and to excuse "inexcuseable neglect" clearly stands as one that is contrary to the decision called for by this Court. Indeed, Townsend itself characterizes this result as an "abuse of discretion" which ignores "proper federal state relations". Id., at 318.

Mr. Cooper filed a motion for post conviction relief pursuant to Fla.R.Crim.P. 3.850 (the state's version of §2254). Granted a full and fair evidentiary hearing, Cooper elected not to offer additional evidence. To meet his burden of

establishing "prejudice" under Lockett v. Ohio, 438 U.S. 586 (1978), and required by Owens v. Wainwright, 698 F.2d 1111 (11th Cir. 1983), Cooper chose to rely upon the original trial court record.

The Eleventh Circuit refused, even on rehearing, to acknowledge that a state evidentiary hearing was conducted or that the defendant made a concious strategic choice. Again, this was not in keeping with the standards announced by this Court in Townsend, and operates as both an affront to the dignity of Florida's courts and an assault upon basic concepts of comity and federalism.

Curiously, a different panel of the Eleventh Circuit reached the opposite result in Thomas v. Zant, 697 F.2d 977, 989 (11th Cir. 1983). Judge Fay, in a concurring opinion, said:

"It seems to me that the

> principles of comity and federalism are paramount and straightforward. Federal courts should not be required to hold hearings nor be asked to grant relief based upon evidentiary material which has never been presented to the state courts when the state courts offered procedures by which the evidence could have been considered".

In Engle v. Isaac, 456 U.S. 107, 128 (1982) this Court held:

> "Finally, the Great Writ imposes special costs on our federal system. The States possess primary authority for defining and enforcing the criminal law. In criminal trials they also hold the initial responsibility for vindicating constitutional rights. Federal intrusions into state criminal trials frustrate both the State's sovereign power to punish offenders and their good faith efforts to honor constitutional rights".

Engle goes on to note that conduct such as that manifested by the Eleventh Circuit "degrades the prominence" of state court proceedings. We would go one step further, noting the Eleventh Circuit's refusal to

even acknowledge the existence of a state court evidentiary hearing.

Thus, the "friction" between the State judiciary and the federal judiciary, intended to be lessened by Townsend, has been unduly exacerbated by the Eleventh Circuit's decision.

The spectre of abuse alluded to in Townsend reaches beyond any "abuse of discretion" on the part of the federal judiciary. The real danger lies in the addition of yet another weapon in the defense arsenal of dilatory and obstructionist pleadings, already criticized in Davis v. Wainwright, U.S. _____, 92 L.Ed.2d 783 (1986) (Powell, J.).

Litigants such as Cooper cannot be permitted to withhold evidence from state courts and then obtain a second federal hearing for the purpose of presenting their

withheld evidence. While defendants might enjoy the benefits of repeated stays of execution and redundant hearings, such a system would be a "perversion of justice", Curry v. Wilson, 405 F.2d 110 (9th Cir. 1968) and would fly in the face of this Court's stated desire for finality and an end to "sandbagging". Engle v. Isaac, 456 U.S. 107 (1982); Wainwright v. Sykes, 433 U.S. 72 (1977); Murch v. Mottram, 409 U.S. 41 (1972).

The State is confident that the decision rendered by the Eleventh Circuit is not one which would have been rendered by this Honorable Court, had it been confronted with the case. The Eleventh Circuit's opinion ignores basic concepts of comity and federalism as well as the established decisional law of this Court. Indeed, this arbitrary ignoral of both the law and the record smacks of the kind of ad

hoc decision making referred to above, lending an unertainty to the criminal justice process which Furman would not tolerate of a state court.

It is for these reasons that it is suggested that certiorari be granted.

CONCLUSION

Certiorari review should be granted to review the decision of the Eleventh Circuit Court of Appeals, inasmuch as said decision is in express and direct conflict with the decisions of this Court and, in addition, works an arbitrary and capricious injustice upon the petitioners through its ad hoc applications and for non-applications of controlling law.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

MARK C. MENSER
Assistant Attorney General
The Capitol
Tallahassee, FL 32301
(904) 488-0600

COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing petition has been furnished by U.S. Mail to Randy Hertz, Esq., New York University School of Law, 715 Broadway, New York, New York 10003; and Judith J. Dougherty, Esq., 906 Thomasville Road, Tallahassee, Florida 32303, this ____ day of March, 1987.

MARK C. MENSER
Assistant Attorney General

OF COUNSEL

APPENDIX

IN THE SUPREME COURT OF
FLORIDA JULY TERM, 1976

VERNON RAY COOPER,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 45,966

Circuit Court
Case No. 74-185-B

Opinion filed July 8, 1976

An Appeal from the Circuit Court in and for Escambia County, Ralph M. McLane, Judge

Richard W. Ervin, III, Public Defender; and Judith J. Dougherty, Assistant Public Defender, for Appellant

Robert L. Shervin, Attorney General; and Raymond L. Marky, Assistant Attorney General, for Appellee

PER CURIAM

Vernon Cooper was convicted of the robbery of a grocery store in Pensacola and the first degree murder of Pensacola Deputy Sheriff Charles Wilkerson. He was sentenced to death by the trial judge following the jury's advisory sentence of death. We

have jurisdiction to review this case under Article V, § 3(b)(1) of the Florida Constitution.

FACTS

Cooper admitted at trial that he and one Steve Ellis robbed the grocery store, and that as they were making their escape in Cooper's black Camaro they were stopped by Deputy Wilkerson, who had stationed himself close to Interstate 10 in order to close off a possible escape route. There was conflicting testimony as to what then transpired. After being stopped, either Cooper or Ellis walked to Deputy Wilkerson's patrol car and fired two shots into his head. He was killed instantly.

A prompt report of Wilkerson's death caused officers Bates and Joy to begin patrolling Interstate 10. They observed and stopped the Camaro after it had crossed

into Alabama. Ellis, who was driving, left the Camaro and approached Bates, who began to frisk him. Joy approached the Camaro, observed Cooper sitting in the passenger's seat, and returned to his patrol car. While doing so, he heard a shotgun fired from inside the Camaro. At that moment Ellis pulled a gun on Bates, but Bates reacted faster and shot Ellis fatally. Cooper then drove off in the Camaro. Both the officers fired several shots and gave chase, but Cooper escaped into the countryside. Cooper was captured the next day, with a shotgun in his possession, after a manhunt by over four hundred persons.

ALLEGED TRIAL ERRORS

Before us Cooper has argued that at least seventeen errors marred his trial. Many of these alleged errors are devoid of merit and deserve only passing discus-

sion.[1] A few require more extensive

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[1] Cooper argues as a matter of law that Section 921.141, Fla. Stat. (1975), authorizing the death penalty in certain cases, is unconstitutional. A majority of the Court recently considered and rejected this contention, and we are bound by those decisions. Alford v. State, 307 So.2d 433 (Fla. 1975); State v. Dixon, 283 So.2d 1 (Fla. 1973). Cooper argues from the record that the trial judge erred in refusing (i) to sever the charges of robbery and murder, (ii) to grant a change in venue, (iii) to refuse to appoint more than two psychiatrists to examine him for competent to stand trial, (iv) to suppress an allegedly coerced confession which was never introduced into evidence, (v) to exclude alleged irrelevant evidence found in Cooper's automobile, (vi) to not extend the time of trial for a few minutes past 5:00 P.M. on one day of this lengthy proceeding, (vii) tc change the sequence of closing arguments from that which is customary in Florida when Crim. Proc. Rule 3.250 does not apply, and (viii) to clarify jury instructions distinguishing between first and second degree felony murder. These rulings were all proper in the circumstances of this case. See State v. Dixon, above, as to jury instructions; Murphy v. Florida, _____ U.S. _____, 43 L.W. 4730 (1975), as a venue, and Fla. Crim. Proc. Rule 3.210(a), as to expert testimony where there is no reason to question competency. The trial judge did not abuse his discretion in refusing to grant severance, since a conviction for felony-

analysis.

1. Inadmissible statements. Cooper raises a threshold issue of whether he was properly advised of his constitutional rights under Miranda v. Arizona, 384 U.S. 436 (1966), and whether a subsequent statement was voluntarily given. The arresting officers, acting to insure Cooper's safety, placed him in a squad car and informed him of his constitutional rights. Cooper then acknowledged his understanding of his rights and was taken to a temporary headquarters set up by the police. He was given a refreshment, and Alabama officers entered the car. He was then questioned for a short time, at which time he told the same story he would later

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murder was possible. Campbell v. State, 227 So.2d 873 (Fla. 1969). As to other points, the record shows no prejudice which would warrant a reversal of Cooper's conviction.

tell at trial. Although there were some members of the search party in the area around the car at this time, they were orderly and were not shown to have made threats of any sort. The trial judge made a thorough inquiry into these matters, and he concluded that the warning was understood and the statements voluntarily given.

We find no reason to reverse the trial judge's determination. The factual circumstances were not inherently intimidating. The trial judge properly inquired to determine whether Cooper was coherent and aware of what he was doing.[2] The state had the burden to prove voluntariness by a preponderance of the evidence,[3] and the trial judge did not err in finding that the

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[2] See, Paramore v. State, 229 So.2d 855 (Fla. 1969).

[3] Lego v. Twomey, 404 U.S. 477 (1972); McDole v. State, 283 So.2d 553 (Fla. 1973).

burden was carried.

2. State violations of criminal rules. Cooper seeks a reversal of his conviction on the ground that the state violated the rules of criminal discovery. On Wednesday, June 12, 1974, five days prior to trial, the state provided defense counsel with the names of seven witnesses and informed him of the existence of a four-hour tape recording of police messages which had been recorded by a private citizen tuned in to the broadcast frequency of the sheriff's office. The state's attorney had learned of these witnesses and the tape only a few days earlier. Defense counsel moved for a continuance in order to conduct discovery and study any new evidence. A hearing was held, after which the motion was denied with leave to ask for reconsideration should any relevant new matters be uncovered. On the morning of

Monday, June 17, 1974, defense counsel renewed his motion for a continuance. Again a hearing was held and the motion was denied. At both hearings it was uncontroverted that the state's attorney supplied defense counsel with the new witnesses' names soon after he learned of them, and that all but one were in possession of information which was identical to that known by other, previously identified witnesses. Only one of these witnesses was called to the stand during the trial, and he only testified for a few minutes.

The only new evidence of any significance to emerge from these late revelations was the tape, which served to place in chronological order the various pieces of other evidence. Defense counsel failed to complete his review of the tape prior to trial due to his unwillingness to retain possession of the tape out of the

presence of the state attorney, fearing the consequence of possible damage to the tape.

As the trial date nears, a prosecutor has the duty under Rule 3.220(f) to "promptly disclose" previously unidentified witnesses and material. A delay of days might be sufficiently prompt where several months remain before trial, but where a complex trial involving a human's life was scheduled to begin in one week, immediate disclosure is dictated by the Rule. Nonetheless, failure to obey the Rule should be remedied in a manner consistent with the seriousness of the breach. Relevant evidence should not be excluded from the jury unless no other remedy suffices.[4] Here the trial judge properly denied the initial request to postpone the

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[4] Williams v. State, 264 So.2d 106 (4th DCA 1972).

trial on the ground that any prejudice could be best assayed after defense counsel had an opportunity to depose the witnesses. By directing the state's attorney to act speedily in making these witnesses available, the trial judge did all that was reasonably required at that time. When he later reconsidered the motion, the witnesses' testimony was found to be cumulative and non-prejudicial. The only hardship then shown by the defense was the failure to have listened to all of the tape, causing an increased burden on defense counsel during the week of the trial. The trial judge concluded that there was no prejudice to Cooper's defense, and that the increased workload was in part the result of a tactical decision by the defense rather than the state's breach of the rules.

Our rules were not designed to eliminate the onerous burdens of trial practice. Their purpose was to avail the defense of evidence known to the state so that convictions would not be obtained by the suppression of evidence favorable to a defendant, or by surprise tactics in the courtroom. While death penalty cases command our closest scrutiny, it is still the obligation of an appellate court to review with caution the exercise of experienced discretion by a trial judge in matters such as a motion for a continuance. We cannot say that the judge's discretion was palpably abused in this cause.[5]

On the third day of trial, another breach of Rule 3.200(f) became apparent

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[5] Andrews v. State, 134 Fla. 450, 184 So. 88 (1938).

when the state announced that a ballistics expert had been inadvertently left off its list of witnesses. In accordance with our holding in Richardson v. State, 246 So.2d 771 (Fla. 1971), the trial judge held a lengthy hearing to determine whether the defense had been unfairly surprised. He ascertained that there was no surprise. The defense had learned that a ballistics test was being performed as early as February 1974, in the course of deposing a witness. During March 1974, defense counsel's investigator spoke to the state's expert and requested that a copy of any ballistics report be sent to defense counsel. The investigator customarily placed memoranda summarizing his activities in counsel's case file, and there was no showing that this did not occur in this instance. For this reason, defense cousel should at least have been aware that a

request for any ballistics report had been made and that the investigator had been in contact with this particular expert. Additionally, the state attorney informed the defense one month before trial that the gun which had been in Ellis' possession when he was apprehended and fatally shot was not the same gun which had fired the fatal shots at Deputy Wilkerson. This fact was the substance of the expert's testimony at trial. It must have been obvious to defense counsel that a ballistics report had been received by the state, and that the state was going to attempt to prove that Cooper himself fired the fatal shots, rather than relying solely upon a felony-murder theory.

Once again the state may have violated a Rule. But when that fact was discovered, the trial judge properly denied the request to exclude the witness or to recess the

trial to enable defense counsel to obtain a ballistics expert of his own. Seeking a less drastic remedy, he recessed the court to allow the defense counsel to depose the expert before he was called to the stand. Since the defense should have been aware of the state's proposed proof by reason of information already known to it, the trial judge acted within the scope of his discretion to remedy whatever prejudice might have resulted from the state's breach.

ALLEGED SENTENCING ERRORS

Cooper attacks the sentencing aspect of his trial on several grounds.

1. Proffers in mitigation. His first alleged error was the trial court's refusing, on grounds of relevance, proffered testimony concerning Cooper's employment prior to the crime, Ellis' reputation for violence, and Cooper's attempts to avoid

Ellis on some prior occasions. Defense counsel sought to have this testimony admitted to show that Ellis had probably fired the fatal shots, and that Cooper was not beyond rehabilitation. While the trial court rejected these proffers, he did permit great latitude in the admission of evidence, some questionably probative or relevant, regarding Cooper's character and his general reputation for veracity and non-violence.

We held in State v. Dixon[6] that the rules of evidence are to be relaxed in the sentencing hearing, but that evidence bearing no relevance to the issues was to be excluded. The sole issue in a sentencing hearing under Section 921.141, Florida

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[6] 283 So.2d 1, 7 (Fla. 1973). The general standard of relevance is explained in Atlantic Coast Line Ry. v. Campbell, 104 Fla. 274, 139 So. 886 (1932).

Statutes (1975), is to examine in each case the itemized aggravating and mitigating circumstances. Evidence concerning other matters have no place in that proceeding any more than purely speculative matters calculated to influence a sentence through emotional appeal. Such evidence threatens the proceeding with the undisciplined discretion condemned in Furman v. Georgia, 408 U.S. 238 (1972).[7]

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[7] The legislative intent to avoid condemned arbitrariness pervades the statute. Section 921.141(2) requires the jury to render its advisory sentence "upon the following matters" (a) Whether sufficient aggravating circumstances exist as enumerated in subsection (6); (b) Whether sufficient mitigating circumstances exist as enumerated in subsection (7), which outweigh the aggravating circumstances found to exist. . . ." (emphasis added). This limitation is repeated in Section 921.141(3), governing the trial court's decision on the penalty. Both sections 921.141(6) and 921.141(7) begin with words of mandatory limitation. This may appear to be narrowly harsh, but under Furman undisciplined discretion is abhorrent whether operating for or against

Testimony regarding Ellis' temperament and Cooper's attempts to avoid Ellis on a few occasions reflected events and opinions too removed from the planning of the robbery and commission of the murder for there to be any rational basis on which the jury could conclude that Cooper acted under Ellis' domination. Similarly, those facts could have no probative bearing on whether Cooper or Ellis fired the fatal shots.

As to proffered testimony concerning Cooper's prior employment, it is argued that this evidence would tend to show that Cooper was not beyond rehabilitation. Obviously, an ability to perform gainful work is generally a prerequisite to the reformation of a criminal life, but an equally valid fact of life is that employment is not a guarantee that one will be

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the death penalty.

law-abiding. Cooper has shown that by his conduct here. In any event, the Legislature chose to list the mitigating circumstances which it judged to be reliable for determining the appropriateness of a death penalty for "the most aggravated and unmitigated of serious crimes,"[8] and we are not free to expand the list.

2. Instructions as to aggravating circumstances. The trial judge instructed the jury to consider whether this murder was "especially heinous, atrocious or cruel," an aggravating circumstance listed in Section 921.141(5)(h). Cooper contends this was improper because, as a matter of law, the murder was not "especially heinous". While we agree that Deputy

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[8] State v. Dixon, 283 So.2d 1, 7 (Fla. 1973).

Wilkerson was not murdered in the "especially heinous" manner contemplated by the statute, we do not believe it was error for the trial judge to instruct the jury on every aggravating and mitigating circumstance listed in Section 921.141, in the absence of trial counsels' acquiescence to the omission of one or more circumstances.

The Legislature intended that the trial judge determine the sentence with advice and guidance provided by a jury, the one institution in the system of Anglo-American jurisprudence most honored for fair determinations of questions decided by balancing opposing factors. If the advisory function were to be limited initially because the jury could only consider those mitigating and aggravating circumstances which the trial judge decided to be appropriate in a particular case, the statutory scheme would be distorted. The

jury's advice would be preconditioned by the judge's view of what they were allowed to know. The judge should not in any manner inject his preliminary views of the proper sentence into the jurors' deliberations, for after the jury has rendered its advisory sentence the judge has the affirmative duty to decide the sentence in the context of his exposure to the law and his practical experience. As we acknowledged in Dixon, "[t]o a layman, no capital crime might appear to be less than heinous, but a trial judge with experience in the facts of criminality" can serve as a buffer where the jury allows emotion to override the duty of a deliberate determination.[9]

Of course, a proper instruction defining the terms "especially heinous, atrocious or cruel,' or any other listed

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[9] State v. Dixon, above, n. 8, at 9.

circumstance, must be given. Here the trial judge read the jury the interpretation of that term which we gave in Dixon. No more was required.

3. Weighing of factors. The final point raised is whether the death penalty was the proper sentence. The trial judge found there to be four aggravating circumstances:

> "1. The defendant was previously convicted of two felonies involving the use or threat or violence to persons; namely, armed robbery.
>
> 2. The murder was committed while the defendant was in the perpetration of a robbery and in flight after committing a robbery.
>
> 3. The murder was committed for the purpose of avoiding or preventing the lawful arrest of the defendant.
>
> 4. The capital felony was especially heinous, atrocious and cruel."

The defense had argued in mitigation that the evidence showed Cooper played a relatively minor role in the murder. As the defense interprets the evidence, Ellis fired the fatal shots and Cooper was guilty of only felony-murder. The trial judge believed Cooper fired the fatal shots and found there to be no mitigating circumstance.

In argument here on review of the judge's sentence, Cooper contends that the murder was not "especially heinous" as a matter of law and that the trial judge ignored the evidence in finding that Cooper fired the fatal shots. The state responds with the contention that this murder was especially atrocious because it was unnecessary to kill Deputy Wilkerson, since escape was otherwise possible.

While we agree with the state that this execution-type murder may have been

unnecessary, we agree with Cooper that the standard of an aggravating circumstance is whether the horror of murder is "accompanied by such additional acts as to set the crime apart from the norm . . . the conscienceless or pitiless crime which is unnecessarily torturous to the victim."[10] This murder was not in that category. Deputy Wilkerson was killed instantaneously and painlessly, without additional acts which make the killing "heinous" within the statutorily-announced "aggravating" circumstance. We have closely scrutinized the record to determine whether it supports the trial judge's conclusion that Cooper fired the fatal shot. There was conflicting testimony on this point. No one saw the actual shooting except, of course, Cooper. One witness standing about 100

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[10] State v. Dixon, above n. 8, at 9.

feet from the scene of the crime testified that he saw a man of Cooper's height and build run from the driver's side of the patrol car to the driver's side of the Camaro, although the scene was illuminated only by the headlights of the two cars. He could not say whether the man entered the driver's side of the Camaro. Another witness, who was driving past the scene, saw a man coming from the direction of the patrol car enter the passenger's side of the Camaro. A third witness, who had been standing about 100 yards away, testified to a belief that the sound of a slamming car door had come from the driver's side of the Camaro. At no time was he able to see anyone in the vicinity of the cars, however, and a state objection to this testimony as mere opinion was sustained. Cooper testified that Ellis followed the Deputy to the patrol car, fired two shots,

returned to the Camaro, and drove off. Cooper said he was in the passenger's seat, where he was later found, at all relevant times.

Cooper suggests that the trial judge erred in excluding testimony concerning the source of the sound of the slamming door. While opinions on the direction of a sound are usually admissible because there is no satisfactory way such observations can be otherwise reproduced in the courtroom,[11] we have recognized that difficult questions concerning opinion evidence can arise which can only be controlled by the discretion of the trial judge.[12] In cases where the direction of a sound was at issue, lay

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11 See, Alford v. State, 47 Fla. 1, 8; 36 So. 436, 438 (1904); VII J. Wigmore, Evidence § 1977 (1940).

12 Kersey v. State, 73 Fla. 832, 74 So. 983 (1917).

opinion has been allowed into evidence where there was some basis to conclude that the witnesses' conclusions were not pure speculation.[13] The issue here was not the general direction from which a sound came, but the pinpointing of a sound to a precise source by a person blinded by darkness and standing 100 yards away. The speculative quality of a conclusion based on the human sense of hearing in such a situation is too great, and the trial judge properly excluded it. In any event, we cannot find that exclusion prejudicial in light of other events at the trial. After the trial judge had sustained the state's objection, counsel for the state extensively questioned the witness on cross-examination

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13 See e.g., Hornsby v. Commonwealth, 305 Ky. 747, 205 S.W. 2d 338 (1947); Smith v. State, 182 Md. 176, 32 A.2d 863 (1943); State v. Shinborn, 46 N.H. 497 (1866).

as to his belief that the driver's door had been slammed. Defense counsel continued the subject on redirect examination, and it was developed further on recross-examination. Whatever the technical effect of sustaining an objection, it is clear that the jury well knew all facets of this witness' observation.

Since we have concluded that the proper evidence was considered by the trial court in determining whether Cooper fired the fatal shots, we have no basis to reverse his conclusions. He heard the testimony and observed the witnesses. The record supports his conclusion.[14]

Imposition of the death penalty is

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[14] Our disposition of this issue renders it unnecessary to consider whether a mitigating circumstance exists in a felony-murder situation solely because the defendant did not perform the act of killing.

never pleasant. Here it cannot be avoided. The statute demands a decision from this Court, and we are bound to follow the law. In this case there were three aggravating and no mitigating circumstances. There is no alternative to the death penalty.

Accordingly, the judgment of guilty of murder in the first degree and robbery is affirmed, and the sentence of death is approved.

It is so ordered.

OVERTON, C.J., ROBERTS, ADKINS, BOYD, ENGLAND, SUNDBERG AND HATCHETT, JJ., Concur

IN THE CIRCUIT COURT
IN AND FOR ESCAMBIA COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

v. CASE NO. 74-185

VERNON RAY COOPER,

Defendant.

/

ORDER DENYING
MOTION TO VACATE

A careful review of the transcript of the evidentiary hearing and the major portions of the trial transcript have been made to determine whether the interest of justice requires a new trial, with the result that I find no reversible error is made to appeal, and the evidence in the record does not reveal that the ends of justice require that a new trial be awarded.

FINDINGS:

1. As to the first allegation of the Motion to Vacate, it is determined from a review of the transcript that the trial judge permitted all mitigating evidence that defense counsel submitted, including totally irrelevant evidence in mitigation, be presented to the jury. Defendant's counsel has extracted from the case cited in support of the motion factual bases that are totally irrelevant to the instance offense and sentence. The dominance of Defendant was not substantiated by the defense witnesses who testified at the trial. Intoxication was not made an issue at the trial of the case and would only have been injected in the sentence phase to "muddy the water".

2. As stated in the above paragraph, Defendant's second allegation is determined to be inapplicable as Defendant's counsel

was permitted to introduce mitigating circumstances that were considered relevant evidence and was not restrict in presenting same to the jury. Defendant has not established any cause and prejudice. Defendant was permitted to introduce evidence from members of the Defendant's family and his girl friend as mitigating factors.

3. The third allegation of Defendant's motion is without merit. The Court's instructions to the jury has already been resolved by the Florida and U.S. Supreme Court, and this Court will not permit Defendant's counsel to replow ground that has already been plowed.

4. I find this contention in Paragraph Four of the motion was a matter which could have been raised on direct appeal and thereby is unavailable in a collateral attack on the judgment. Meeks v. State,

382 So.2d 673.

The fact that the Defendant's collateral attack is alleged to be one of constitutional dimension does not preclude a waiver by the failure to assert it on direct appeal.

5. Defendant failing to offer any argument on Paragraph Five of his motion, the same is deemed waived and will be dismissed.

6. Defendant's Paragraph Six and Seven have been passed on by the Florida Supreme Court on direct appeal, and the Court will not substitute its judgment in lieu of the Supreme Court's decision. Sullivan v State, 372 So.2d 938.

7. A review of the trial transcript reveals that the trial counsel was not ineffective in view of the totality of the trial, as stated in McKenna v. State, 280 F.2d 592.

"We interpret the right to counsel as the right to effective counsel. We interpret counsel to mean not errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render reasonably effective assistance".

8. The Defendant's motion alludes to ineffectiveness of counsel for trial counsel's failure to seek a stipulation from the State for the use and introduction of a polygraph examination.

It has repeatedly been held by the courts that polygraph examinations are inadmissible as irrelevant evidence.

9. This allegation of the motion, failure to object to inflammatory remarks made by the State Attorney requires no review, as Florida has consistently held that same are waived when not objected to at trial.

10. Defendant's allegation as to trial counsel's failure to plea bargain is refuted by the record. The record reflects that the defendant rejected plea negotiations as proposed by the State.

The remaining allegations of Defendant's motion is totally without record evidence and are refuted by the trial transcript which are attached hereto and hereby made a part hereof by said attachment.

The Court having thoroughly considered said Motion to Vacate, it is

ORDERED that Defendant, VERNON RAY COOPER'S, Motion to Vacate be and the same is hereby denied.

DONE AND ORDERED at Pensacola, Escambia County, Florida this 23 day of October, 1980.

Jack H. Greenhut
CIRCUIT JUDGE

Copies to:

Curtis A. Golden, State Attorney
First Judicial Circuit

Raymond L. Marky
Asst. Attorney General

Judith J. Doughtery,
Asst. Public Defender

SUPREME COURT OF FLORIDA

No. 59,970

VERNON RAY COOPER, Appellant,

vs.

STATE OF FLORIDA, Appellee.

(July 14, 1983)

PER CURIAM.

Vernon Cooper was convicted of first-degree murder and sentenced to death in 1974. We affirmed his conviction and sentence, Cooper v. State, 336 So.2d 1133 (Fla. 1976), and the Supreme Court of the United States denied his petition for certiorari, Cooper v. Florida, 431 U.S. 925 (1977). Subsequently, Cooper filed a motion for postconviction relief which was denied by the trial court after an evidentiary hearing. He now appeals the

denial of his request for postconviction relief. We affirm.

Among the issues which were raised in the proceeding below and which are renewed here are suggestions that counsel was ineffective at Cooper's trial and that the trial court violated the dictates of Lockett v. Ohio, 438 U.S. 586 (1978), in limiting the introduction of mitigating evidence relevant to Cooper's character, his record, and the circumstances of his offense.

The issue of ineffective assistance of counsel at Cooper's original trial was explored extensively at the hearing on Cooper's 3.850 motion. The trial court concluded that counsel was not ineffective. We have reviewed the record to determine whether this finding is supported by competent substantial evidence. The argument between Cooper and the State on

this issue boils down to a verbal dispute as to whether counsel was extraordinarily canny (as the State sugests) or unwittingly negligent (as Cooper suggests). Both arguments are abstractly persuasive, but, in light of the facts developed at the evidentiary hearing and applying the standard we announced in Knight v. State, 394 So.2d 997 (Fla. 1981), we have little difficulty in concluding that the trial judge properly rejected Cooper's claim of ineffective assistance of counsel.

The other issues now presented were either raised or could have been raised in the original proceedings and are not appropriate matters for collateral attack. Hargrave v. State, 396 S.2d 1127 (Fla. 1981); Washington v. State, 397 So.2d 285 (Fla. 1981); Witt v. State, 387 So.2d 922 (Fla.), cert. denied, 499 U.S. 1067 (1980). Cf. United States v. Frady, 456

U.S. 152 (1982); Engle v. Isaac, 456 U.S. 107 (1982). Only one of these issues merits discussion. This is Cooper's claim that the trial court violated the dictates of Lockett by unduly restricting the introduction of evidence relevant to nonstatutory mitigating circumstances. In his initial appeal from his conviction and sentence, Cooper raised the question of whether certain evidence he had proffered was probative and relevant to the statutory mitigating factors, and we answered this question in the negative. He now attempts again to raise the issue of relevancy of this evidence but on a different basis than originally argued in his direct appeal. He contends that Lockett, decided subsequent to his trial and appeal, compels a reversal of his sentence. When his original appeal was taken to this Court, however, Florida's law was consistent with the pronouncement

of Lockett. In Songer v. State, 365 So.2d 696 (Fla. 1978), cert. denied, 441 U.S. 956 (1979), we held that the wording of the death penalty statute and the construction placed by this Court on that statute indicate unequivocally that the list of mitigating factors contained in this statute is not exhaustive. We referred to our earlier decisions in Buckrem v. State, 355 So.2d 111 (Fla. 1978); Washington v. State, 362 So.2d 658 (Fla. 1978), cert. denied, 441 U.S. 937 (1979); McCaskill v. State, 344 So.2d 1276 (Fla. 1977); Chambers v. State, 339 So.2d 204 (Fla. 1976); Meeks v. State, 336 So.2d 1142 (Fla. 1976); Messer v. State, 330 So.2d 137 (Fla. 1976); and Halliwell v. State, 323 So.2d 557 (Fla. 1975), among others, to demonstrate this Court's constant view that all relevant circumstances may be considered in mitigation and that the statutory factors merely

indicate principal factors to be considered. We made clear that Lockett did not change the law in Florida since our law reexisting Lockett was consistent with the dictates of Lockett.

Balancing the goals of the criminal justice system of ensuring finality of decisions and of ensuring fairness and uniformity in individual cases, in Witt v. State, we addressed the question of the significance of a change in decisional law on the finality of a fully adjudicated capital case. We explained the nature of a change of law that would be considered in a capital case under Rule 3.850 and said that this change of law must emanate from this Court or the Supreme Court of the United States, must be constitutional in nature, and must constitute a development of fundamental significance. Lockett did not change the law of Florida. Thus, Cooper,

if he wanted to claim that the trial court unduly restricted the introduction of evidence relevant to nonstatutory mitigating circumstances, should have raised this claim on direct appeal. Having failed to do so, he may not now raise this claim for the first time in a Rule 3.850 motion. Postconviction proceedings are not intended to afford defendant a second appeal, and a defendant cannot argue on appeal the relevancy of evidence on one ground and then by collateral attack again argue the relevancy of that evidence on a different ground.*

Accordingly, the trial court's denial of postconviction relief is affirmed.

It is so ordered.

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* We incidentally note that the trial court did in fact allow some testimony relevant to nonstatutory mitigating factors.

ALDERMAN, C.J., ADKINS, BOYD and EHRLICH, JJ., Concur
OVERTON and McDONALD, JJ., Concur in conviction, but dissent from sentence.

NOT FINAL UNTIL TIME EXPIRE TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

An Appeal from the Circuit Court in and for Escambia County

Jack H. Greenhut, Circuit Judge - Case No. 74-185

Judith J. Dougherty, Special Assistant Public Defender, Second Judicial Circuit, Tallahassee, Florida

for Appellant

Jim Smith, Attorney General and Raymond L. Marky, Assistant Attorney General, Tallahassee, Florida,

for Appellee

IN THE UNITED STATES DISTRICT
COURT FOR THE NORTHERN DISTRICT
OF FLORIDA PENSACOLA DIVISION

VERNON RAY COOPER,

Petitioner,

vs. PCA 84-4144/RV

LOUIE L. WAINWRIGHT,
et al.,

Respondents.
_____/

REPORT AND RECOMMENDATION

The above-styled case comes before the court upon a petition for writ of habeas corpus filed pursuant to the provisions of Title 28, United States Code, Section 2254, and the various pleadings related thereto. The petitioner essentially challenges the legitimacy of his conviction for first degree murder and the death sentence imposed on that conviction. In addition, the petitioner has applied to this court for an order staying the petitioner's

execution, which application remains pending. It is noted that no death warrant has been issued to date.

The petitioner has filed with this court a motion for supplementation of record (document 12). In that motion, the petitioner seeks to supplement the record with the appendix to the petitioner's state motion to vacate, set aside or correct sentence. The petitioner requests the court to order the respondents to furnish a copy of the appendix as part of the record in this case. It appears, however, that the appendix in question relates to a polygraph examination. As polygraph evidence is incompetent evidence in this court, United States v. Masri, 547 F.2d 932, 936 (5th Cir. 1977), the petitioner's motion should be denied.

The petitioner, Vernon Ray Cooper, was convicted, in 1974, of the robbery of a

Pensacola grocery store, and of the first degree murder of Escambia County Deputy Sheriff Charles Wilkerson. The petitioner was subsequently sentenced to death by the trial judge, upon the jury's recommendation, following the penalty phase of the trial. The petitioner's conviction was affirmed on appeal by the Supreme Court of Florida on July 8, 1976. Cooper v. State, 336 So.2d 1113 (Fla. 1976). The petitioner also filed a motion for post-conviction relief, pursuant to Section 3.850 of the Florida Rules of Criminal Procedure, the denial of which motion, by the Circuit Court for the Florida First Judicial Circuit, was affirmed by the Supreme Court of Florida on July 14, 1983. Cooper v. State, 437 So.2d 1070 (Fla. 1983).

The evidence adduced at trial revealed that the petitioner, along with one Steve Ellis, robbed a Pensacola grocery store.

During their escape from the robbery, they were stopped in their black Camero by Deputy Wilkerson. While stopped, one of the suspects walked to Deputy Wilkerson's car and fired two shots into his head killing him. There was some conflicting evidence as to which of the suspects fired the fatal shots. Subsequently, Cooper and Ellis were stopped by other officers and, during a brief exchange of gun fire, Steve Ellis was killed. Cooper fled the scene on foot but was apprehended early the following morning.

In his petition, the petitioner raises some 15 grounds for federal habeas corpus relief, labeled A through O. A review of the record reveals that the petitioner has failed to present a number of these claims in state court proceedings. The undersigned notes that these claims might generally be barred from habeas corpus

review based upon the petitioner's procedural default. Such procedural defaults notwithstanding, the undersigned, recognizing the seriousness of this matter as well as the burdensome nature of death penalty appeals, shall now consider the merits of each individual ground in the petition.

A. Exclusion of Mitigating Evidence.

The petitioner contends that his rights under the Eighth and Fourteenth Amendments of the United States Constitution were violated by the trial court in the court's alleged interpretation of the Florida Death Penalty Statute so as to exclude certain non-statutory mitigating circumstances. Moreover, the petitioner contends that the trial court erred in excluding substantial mitigating evidence which the defense sought to introduce in the penalty hearing. This evidence concerned: the petitioner's

employment; the petitioner's attitude toward his prior incarcerations; a specific incident illustrating the petitioner's patience and good character; the petitioner's marital plans and relationships; accomplice Steve Ellis' reputation for violence; specific violent acts by Steve Ellis; Steve Ellis' practice of keeping firearms; and the petitioner's fear of Steve Ellis, and attempts to avoid Steve Ellis. The petitioner cites in support of this position the United States Supreme Court decisions in the cases of Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) and Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982).

In 1978, the Lockett court determined that the Eighth and Fourteenth Amendments require that the sentencer not be precluded, by statute, from considering any miti-

gating factor relating to the defendant's character or record, nor from weighing any of the circumstances of the offense. 438 U.S. at 604. The Lockett court found that "a death penalty statute must not preclude consideration of relevant mitigating factors." 438 U.S. at 608.

More recently, in the Eddings opinion, the court reiterated its findings in Lockett, holding that just as the state court could not preclude the sentencer from considering any mitigating factor, the sentencer could not refuse to consider relevant mitigating evidence. 455 U.S. at 114. The court determined that the evidence in question in Eddings' case was relevant mitigating evidence which should have been considered. 455 U.S. at 115.

As stated above, the petitioner contends that the trial court's exclusion of the aforementioned evidence was in viola-

tion of the standards set forth in the Lockett and Eddings decisions, and therefore a violation of the petitioner's Eighth and Fourteenth Amendment rights. After a careful of the record, the undersigned cannot concur with this contention.

The evidence in question was proffered during the penalty phase of the petitioner's trial but was excluded from presentation to the jury by the trial judge. Although the trial judge did make a statement to the effect that the mitigating circumstances presented should generally be limited to those enumerated in the statute (T. XIV - 23), the judge permitted introduction of character evidence not enumerated in the statute. It is here noted that the Florida Death Penalty Statute does not limit mitigating factors to those enumerated in the statute. Fla.Stat. §921.141. A review of the record reveals

also that in this instance the decision to exclude the evidence in question was based on the relevancy of that evidence or the competency of the witness who was to present it. The undersigned concludes that the trial judge did not exclude from the jury's consideration, during the penalty phase of the trial, any relevant mitigating factors.

Furthermore, the undersigned does not concur with the petitioner's contention that there was excluded from consideration, mitigating evidence "significant enough to have tipped the sentencer's balancing in favor of a non-capital sentence." The jury was permitted to hear non-statutory mitigating evidence and instructed to consider all of the evidence tending to establish mitigating circumstances. (T. XIV - 145). In addition, the failure to consider this evidence did not "create a

substantial likelihood that there was actual and substantial disadvantage to the defendant." Ford v. Strickland, 696 F.2d 804, 813 (11th Cir. 1983). As a result, there was no Eighth or Fourteenth Amendment violation under the Lockett/Eddings standards in the exclusions of the evidence in question. Thus, this initial ground does not present a basis for habeas corpus relief.

B. Non-Unanimity of Guilty Verdict.

In his second stated ground for federal habeas corpus relief, the petitioner contends that his rights under the Sixth and Fourteenth Amendments were violated in the lack of clear unanimity in the jury's verdict of guilty of first degree murder. The petitioner alleges that, on the basis of the guilty verdict, it is impossible to ascertain whether the jury intended

unanimously to convict the petitioner under the first degree murder theory of premeditation or for the offense of felony murder.

The petitioner essentially relies upon the case of United States v. Gipson, 553 F.2d 453 (5th Cir. 1977) in support of this contention. In Gipson, the former Fifth Circuit reversed Gipson's conviction on the basis that a jury charge, which permitted a finding of guilty if the defendant committed any one of six enumerated acts, improperly permitted a finding of guilty, without unanimity as to which of the two conceptual groupings upon which the jury findings was based. 453 F.2d at 458-59.

Unlike the Gipson case, in which the evidence supported conflicting juror determinations as to just what the defendant did, the evidence in the petitioner's case was sufficient to support a finding of guilty beyond a reasonable doubt under

either of two separate theories of first degree murder. At the very minimum, the jury found the petitioner guilty of robbery and the evidence clearly established that the murder took place in furtherance of the petitioner's escape from the robbery scene. Thus, unanimity is at least found under a felony murder theory. See, Drake v. Francis, 727 F.2d 990, 997 (11th Cir. 1984). Accordingly, federal habeas corpus relief should be denied as to this second contention.

C. Lack of Jury Finding that the Petitioner Killed or Intended the Death of the Victim.

The petitioner asserts that the imposition of the death penalty in this instance, without a jury finding that the petitioner either killed or intended the death of the victim, violates the petitioner's rights

under the Sixth, Eighth, and Fourteenth Amendments. The petitioner contends that he was entitled to a specific jury determination that he killed or intended death before the death sentence could be imposed.

In 1982, the United States Supreme Court in Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982), determined that the Eighth Amendment did not permit imposition of the death penalty on a person "who aids or abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed." 458 U.S. at 797. The Enmund court noted that the focus must be on the petitioner's culpability not on the culpability of his associates. Id. at 798. As evidence in that case established that Enmund did not kill or attempt to kill

or that he "had any intention of participating in, or facilitating, a murder," the state court's judgment upholding the death penalty was reversed. Id. at 798, 801.

By focusing direct attention upon the present petitioner's culpability in the murder in question, the undersigned concludes that Cooper's culpability was significantly greater than that of Enmund. Enmund was found to be, at most, the driver of the get away car for the person who committed the robbery and the murder. The evidence in the petitioner's case, however, supported a finding that the petitioner's case, however, supported a finding that the petitioner was in fact the triggerman who took Deputy Wilkerson's life. The sentencer, i.e., the trial judge, made the specific finding that the petitioner personally killed the victim, which findings was upheld by the Florida Supreme

Court. Cooper v. State, 336 So.2d at 1141. As a result, the penalty imposed in this matter was not disproportionate to Cooper's involvement in the crime and no violation of the Sixth, Eighth, or Fourteenth Amendment exists as to this claim. See, Henry v. Wainwright, 721 F.2d 990, 995 (5th Cir. 1983); Ross v. hopper, 716 F.2d 1528, 1532-33 (11th Cir. 1983).

D. Inadequacy of Appellate Review.

The petitioner also seeks federal habeas corpus relief based upon the alleged failure of the Florida Supreme Court to provide an adequate appellate review of the appropriateness of the petitioner's death sentence. The petitioner contends that this failure violated his constitutionally protected rights under the Eighth and Fourteenth Amendments of the United States Constitution.

The petitioner states four grounds upon which the review of the case by the Supreme Court of Florida is alleged to be inadequate. First, the petitioner contends the Florida Supreme Court erroneously and unconstitutionally treated mitigating circumstances as limited to those enumerated in the statute. Second, the petitioner alleges that the Supreme Court erroneously and unconstitutionally interpreted the statute as mandating the death penalty. Next, the petitioner asserts that the Supreme Court eliminated non-statutory mitigating circumstances from appellate review. Finally, the petitioner contends that had the Supreme Court chosen to review non-statutory mitigating circumstances, it was prevented from doing so by the trial court's rulings on such evidence.

The undersigned concurs with the petitioner's assertion that some form of

meaningful review is not only necessary, but patently mandated, when a death sentence has been imposed. See, Pulley v. Harris, _____ U.S. _____, 104 S.Ct. _____, 79 L.Ed.2d 29, 37 (1984); Zant v. Stephens, _____ U.S. _____, 103 S.Ct. _____, 77 L.Ed.2d 235, 248 (1983). The Florida Death Penalty Statute provides for an automatic review by the Supreme Court of Florida, of the conviction and sentence where the death penalty is imposed. This review is given priority over all other cases by statute. Fla.Stat. §921.141(4). The undersigned, however, does not agree with the petitioner's assessment of the validity of the appellate review conducted by the Supreme Court of Florida in the petitioner's case. Although the Supreme Court of Florida in the Cooper decision noted that it was "not free to expand the list" of statutory mitigating circum-

stances, Cooper v. State, 336 So.2d at 1139, the undersigned finds that the court did not erroneously and unconstitutionally treat mitigating circumstances as limited to those enumerated in the statute. The court significantly discussed the evidence proffered during the penalty phase of the trial and the trial court's rulings on that evidence. 336 So.2d at 1139. The key question went to the relevancy of any non-statutory mitigating evidence. The Supreme Court found that the trial court liberally permitted the introduction of character and reputation evidence of questionable relevancy. As noted earlier in this report, there was no relevant non-statutory mitigating evidence presented. Thus, appellate review was not inadequate in this regard.

Likewise, appellate review was not inadequate as to the contention that the Supreme Court unconstitutionally determined

the Florida Death Penalty Statute to be a mandatory death penalty law precluding an individualized determination whether the death penalty was appropriate in the petitioner's case. Although the language of the Cooper opinion quoted by Mr. Justice Stephens in his concurring opinion in Barclay v. Florida, _____ U.S. _____, 103 S.Ct. _____, 77 L.Ed.2d 1134, 1151-52, n.3 (1983) (Stephens, J. concurring), reveals that the court found "no alternative to the death penalty" in the petitioner's case, Cooper v. State, 336 So.2d at 1142, there is no indication that the court found this determination to be mandated by statute as opposed to being mandated by the individual circumstances involved. The specific reference to the statute in the Florida Supreme Court's conclusion related to the court's duty to render a decision in the matter as mandated by the statutory provi-

sion providing for automatic appellate review. The undersigned concludes that the Supreme Court of Florida's determinations in this matter were significantly individualized and that its ultimate conclusion in supporting the sentence of death was not based upon an interpretation of the Florida Death Penalty Statute as a "mandatory" death penalty law.

The petitioner's contentions that the Florida Supreme Court eliminated non-statutory mitigating circumstances from appellate review and that such circumstances were precluded from review by the trial court's ruling are found to be without merit. The Cooper court discussed the evidence in question and upheld the trial court's determination that there was no relevant non-statutory mitigating evidence presented. 336 So.2d at 1139. The Supreme Court was not precluded from

consideration of the non-statutory mitigating evidence the petitioner would have presented, nor did the court ignore such evidence as was apparent by the above-noted appellate discussion. Thus, the petitioner received meaningful appellate review concerning the non-statutory mitigating evidence the petitioner sought to present. As a result, the petitioner has presented no valid claim of inadequate appellate review as a basis for federal habeas corpus relief.

E. New Sentencing Hearing Necessitated by State Supreme Court's Reversal of Aggravating Circumstance.

The petitioner contends that a new sentencing hearing was warranted when the Florida Supreme Court reversed one of the aggravating circumstances relied upon by the trial judge, as the jury recommended the death penalty without specifying the

aggravating circumstances relied upon. The petitioner alleges that the Supreme Court's failure to require a new sentencing hearing violated the petitioner's Eighth and Fourteenth Amendment rights.

In imposing a sentence of death in the petitioner's case, the trial judge enumerated four aggravating circumstances, in his findings of fact, in support of the sentence. The fourth of these, that "the capital felony was especially heinous, atrocious and cruel" (Record on Appeal at 190), was reversed by the Supreme Court on the basis that the murder of Deputy Wilkerson was instantaneous and did not fall within this category. Cooper v. State, 336 So.2d at 1141. The Supreme Court, however, found no basis upon which to reverse the trial judge's ultimate conclusion. Id.

When faced with issues similar to the questions presently raised, the Eleventh Circuit has recently determined that where one or more of several aggravating circumstances has been stricken on appeal, in the absence of mitigating factors, the death penalty may be sustained so long as it is supported by additional aggravating circumstances. Adams v. Wainwright, 709 F.2d 1443, 1447-48 (11th Cir. 1983); Antone v. Strickland, 706 F.2d 1534, 1539 (11th Cir. 1983); Ford v. Strickland, 696 F.2d 804, 813-815 (11th Cir. 1983). As there were no statutory mitigating circumstances presented in this matter, and, as there were no relevant non-statutory mitigating circumstances in issue, the Eighth and Fourteenth Amendments did not require a new sentencing hearing based upon the reversal of the aggravating circumstance in question. Moreover, the undersigned does

not concur with the petitioner's claim regarding inadequate appellate review as a basis for a new sentencing hearing, as it has been previously noted that appellate review of the petitioner's case was not inadequate. Section 2254 relief, therefore, should be denied as to this claim.

F. Dual Use of Robbery as A Basis for Felony Murder Conviction and as Aggravating Circumstances at Sentencing.

In this next stated ground for Section 2254 relief, the petitioner contends that his constitutional rights under the Fifth, Eighth and Fourteenth Amendments of the United States Constitution have been violated by the "dual use" of the robbery offense in serving as the predicate for the first degree murder conviction and as an aggravating circumstance to justify the death sentence.

The petitioner's contention that the "dual use" of the robbery violated the Double Jeopardy Clause of the Fifth Amendment is without merit. The Double Jeopardy Clause provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." U.S. CONST., amend. V. The Double Jeopardy Clause thus "protects against a second prosecution for the same offense after acquittal . . . , against a second prosecution for the offense after conviction . . . , [and] against multiple punishments for the same offense." North Carolina v. Pearce, 395 U.S. 711, 717, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969) (footnotes omitted). As the petitioner has not been subjected to multiple prosecutions or punishment by the "dual use" of the robbery, there is no valid double jeopardy claim presented.

Likewise, the undersigned finds no validity in the petitioner's claims that the Eighth Amendment prohibited the "dual use" of the robbery. The petitioner's contention that the "dual use" of the robbery would result in an automatic death sentence and thus eliminate sentencer discretion has been expressly rejected by this Circuit. See, Henry v. Wainwright, 721 F.2d 990, 996 (5th Cir. 1983); Adams v. Wainwright, 709 F.2d 1443, 1447 (11th Cir. 1983). It is further noted that the Florida Death Penalty Statute which includes the use of the aggravating circumstance in question has been upheld by the United States Supreme Court. Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). Thus, the undersigned recommends denial of habeas corpus relief as to this claim.

G. Ineffectiveness of Counsel.

The petitioner contends that he was denied effective assistance of counsel during both phases of his criminal trial in violation of the Sixth, Eighth, and Fourteenth Amendments of the United States Constitution. Specifically, the petitioner alleges that his trial counsel, John Grass, was inexperienced and failed, in his representation of the petitioner, to meet the constitutional standards for competence of counsel in capital cases.

In considering a claim of ineffective assistance of counsel, this court is guided by the standards set forth in the recent United States Supreme Court decision in Strickland v. Washington, _____ U.S. _____, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The Washington found that in order to obtain habeas corpus relief for an ineffective assistance of counsel claim, the petitioner

must show not only that counsel did not provide reasonably effective assistance, as guaranteed by the Sixth Amendment, but that the petitioner was prejudiced to the point that his counsel's errors were so serious that but for the ineffectiveness of counsel, the results of the trial would have been different. 80 L.Ed.2d at 693.

Upon reviewing the record, the undersigned concludes that the petitioner has failed to reveal that he was denied reasonably effective assistance of counsel as guaranteed by the Sixth Amendment during either the guilt or penalty phases of the trial, let alone that the results of the trial, or the sentence, would have been different. The record reveals that Mr. Grass diligently and effectively represented the petitioner throughout his entire criminal proceedings. The undersigned finds that inexperience does not amount to

ineffectiveness, particularly in the case at hand. It is noted that the Supreme Court of Florida reached the same conclusion upon appeal of the trial court's denial of the petitioner's state 3.850 motion. Thus, the petitioner has presented no valid claim for federal habeas corpus relief based upon ineffective assistance of counsel.

H. Improper Admission of Confession at Trial.

Next, the petitioner claims that the admission of the petitioner's oral confession at trial violated the Fifth and Sixth Amendments to the United States Constitution. The confession in question consisted of the petitioner's oral statements, made following the petitioner's arrest after a lengthy chase and search, to the arresting officers in their police car. It is noted that the petitioner was informed of, and

acknowledged understanding, his Miranda rights. (T. XII - 165-67). See, Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 695 (1966). In his confession, the petitioner admitted to participation in the robbery, escape from the robbery with Steve Ellis, presence at the scene when Steve Ellis allegedly killed the officer, and disposal of the murder weapon (T. XII - 170-77). The petitioner contends that the statements were involuntarily made and thus inadmissible.

At trial, the petitioner sought to have the statements in question suppressed (T. XII - 158). The trial judge determined, following a lengthy proffer by the State of testimony of the witness who questioned the petitioner, that the statements given by the petitioner "were freely and voluntarily given to the law officers . . . without violation of the [petitioner's] constitu-

tional rights against self-incrimination" (T. XII - 164). The Supreme Court of Florida, when presented with the issue on appeal, determined that there was no reason to reverse the trial judge's decision, as the trial court properly found that the State had met its burden of proving the voluntariness of the confession. Cooper v. State, 336 So.2d at 1137.

Where a state court makes a determination on a factual issue, that determination, if fairly supported by the state court record, is entitled to a presumption of correctness in a federal habeas corpus proceeding. Marshall v. Lonberger, 459 U.S. 422, 432, 103 S.Ct. 843, 74 L.Ed.2d 646 (1983). In order to overturn a state court's determination, a federal court must conclude that those findings lacked even fair support in the record. 459 U.S. at 432. See, 28 U.S.C. § 2254(d); Cox v.

Montgomery, 718 F.2d 1036 (11th Cir. 1983). See also Sumner v. Mata, 455 U.S. 591, 102 S.Ct. 1303, 71 L.Ed.2d 480 (1982); Patterson v. Cuyler, 729 F.2d 480 (3rd Cir. 1984).

The undersigned concludes, after reviewing those portions of the record relating to the petitioner's confession, that the record fairly supports the trial court's determination that the statements made were given freely, voluntarily, and with knowledge of the petitioner's Fifth Amendment rights. Thus, the presumption of correctness provided by 28 U.S.C. § 2254(d) and the above-noted authority must be accorded in this instance. As a result, federal habeas corpus relief is not warranted as to this claim.

I. Pretrial Publicity and Change of Venue.

The petitioner also seeks Section 2254 relief on the basis that the petitioner's pretrial motion for change of venue was denied by the trial court. The petitioner contends that this denial prevented the petitioner from receiving a fair trial by an impartial jury, thus violating the Sixth and Fourteenth Amendments of the United States Constitution. The petitioner sought a change of venue based upon the extensive media coverage of the crime and impending trial.

The question this court must consider when faced with such a challenge is not whether there was so much publicity generated that the community would remember the case, but whether the individual jurors had such a fixed opinion that they could not judge impartially the guilt of the defendant. Patton v. Yount, 467 U.S. ____, 104

S.Ct. ____, 81 L.Ed.2d 847, 856 (1984). In addition, this court should apply the statutory presumption of correctness to the trial court's resolutions as to the impartiality of jurors. 81 L.Ed.2d at 858.

After a careful review of the record, the undersigned concludes that there has been no constitutional violation in the trial court's denial of a change of venue in this matter. The vior dire examination clearly reveals that each juror empaneled was questioned as to his or her knowledge of the case and related that such knowledge, if any, would not effect his or her impartiality. Thus, the record supports the trial court's denial of the petitioner's motion for a change of venue and that denial is entitled to a presumption of correctness. Section 2254 relief, therefore, is inappropriate as to this claim.

J. Removal of Jurors with Scruples Against Capital Punishment.

The petitioner contends that, during the jury selection in his case, certain jurors with scruples against capital punishment were improperly excluded for cause. The petitioner alleges that these exclusions deprived the petitioner of a representative jury, permitted a prosecution-prone jury, and violated the petitioner's Sixth, Eighth and Fourteenth Amendment rights. The petitioner generally relies on the case of Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968) in support of this contention.

This court, however, is now guided, when faced with such a challenge, by the recent United States Supreme Court decision in the case of Wainwright v. Witt, 53 L.W. 4108 (No. 83-1427, Jan. 21, 1985). The

Witt court held that the test as to when a juror may be properly excluded for cause, is that enunciated in the case of Adams v. Texas, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980). 53 L.W. at 4110. The Adams test provides "that a juror may not be challenged for cause based on his views about capital punishment unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." Adams, 448 U.S. at 45. See, Witt, 53 L.W. at 1411. In following the Adams test, the Witt court clarified the previous Witherspoon burden of proof test, as to when a juror exhibits his views such that they would impair performance, and determined that the Witherspoon standard "does not require that a juror's bias be proved with 'unmistakeable clarity'". Witt, 53 L.W. at 4111. The Witt court went on to

find that a trial court's determination that a prospective capital sentencing juror was properly excluded for cause, is a factual determination entitled to the statutory presumption of correctness afforded by 28 U.S.C. § 2254(d). Id. at 4112-13. See, Patton v. Yount, 81 L.Ed.2d 847 (1984).

Upon reviewing the record, the undersigned concludes that the exclusion of juror Buchberg and other venirepersons opposed to capital punishment did not deprive the petitioner of a representative jury The voir dire examination provided a basis upon which to exclude each juror in question, as those jurors expressed opinions that their views on capital punishment might prevent or impair their performance of their duties as jurors. As provided by the Witt opinion, the individual juror's bias need not have been

expressed with "unmistakable clarity." 53 L.W. at 4111. The undersigned finds "ample support for the trial court's findings that [the excused venirepersons'] views would have prevented or substantially impaired the performance of [their] duties as [jurors]." Id. at 4114. The presumption of correctness afforded by Section 2254(d) must attach and habeas corpus relief should be denied as to this claim.

K. The Trial Judge's Selective and Unequal Treatment of Mitigating and Aggravating Circumstances in Jury Instructions.

The petitioner alleges that the trial judge's decision on whether to give instructions on particular statutory mitigating and aggravating circumstances constituted selective and unequal treatment of the statutory circumstances, violating the Eighth and Fourteenth Amendments. The trial court instructed the jury as to five

out of eight statutory aggravating circumstances and three out of seven statutory mitigating circumstances.

Although the Florida Supreme Court noted that, if "the jury could only consider those mitigating and aggravating circumstances which the trial judge decided to be appropriate in a particular case, the statutory scheme would be distorted," Cooper v. State, 336 at 140, the undersigned concludes that the petitioner was only constitutionally entitled to jury instructions which would be supported by the evidence presented. See, Beck v. Alabama, 447 U.S. 625, 635-36, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980). The undersigned notes that the record reveals that the circumstances presented in the instructions were those, but for one exception, supported by the evidence of trial. That one exception, as discussed

previously, was the aggravating circumstance relating to the "heinous, atrocious and cruel" nature of the crime, which was reversed by the Florida Supreme Court. The evidence adduced at trial did not support the aggravating and mitigating circumstances omitted from the jury instruction. Thus, the petitioner had no constitutional right to have these presented and habeas corpus relief is not warranted as to this claim.

L. Inadequate Guidance To Jury on Burden of Proof in Sentencing.

The petitioner's next claim is that "the inadequacy of the jury instructions on burden of proof in sentencing, when coupled with the prosecutor's erroneous and misleading closing argument on burden of proof, resulted in a jury that was inadequately guided in its sentencing determination in violation of the Eighth ... and

Fourteenth Amendments[s]." Petitioner's Brief in Support of Petition at 45. The petitioner argues that the State's closing argument during the penalty phase of the trial contained misleading statements regarding the burden of proof. In addition, the petitioner asserts that the trial judge erred in not providing the jury guidance as to the question of weighing aggravating and mitigating circumstances in its determination of whether a death sentence would be apropriate.

As to these contentions, it is first noted that the State bore the burden of proving aggravating circumstances beyond a reasonable doubt and the jury was so instructed as to this burden of proof (T. XIV - 144, 145). Otherwise, "the process of weighing circumstances is a matter for judge and jury, and, unlike facts, it is not susceptible to proof by either party."

Ford v. Strickland, 696 F.2d 804, 818 (11th Cir. 1983). No particular guidance or instructions are mandated as to how the jury is to proceed in its balancing function. See, Sonnier v. Maggio, 720 F.2d 401, 408 (5th Cir. 1983).

The record reveals that the comments by the State regarding the balancing function did not result in misleading the jury as to the applicable burden of proof. In addition, the trial court's instruction dealing with the weighing of aggravating and mitigating circumstances provided sufficient guidance to the jury in reaching its determination regarding the appropriateness of the death penalty (T. VIX - 142, 144, 145). See, Proffitt v. Florida, 428 U.S. 242, 258 (1976). As a result, this claim is not one upon which Section 2254 relief may be granted.

M. Violation of Discovery Rules and Denial of Continuance.

Next, the petitioner contends that the prosecutor's violation of certain discovery rules and the trial court's denial of the petitioner's request for a continuance, sought in light of the discovery violations, violated the petitioner's Fourteenth Amendment rights to due process.

On appeal, the Florida Supreme Court determined that the State had twice violated Florida Rules of Criminal Procedure 3.220(f) requiring prompt disclosure of previously unidentified witnesses and material. Cooper v. State, 336 So.2d at 1137, 1138. The court found, however, that the trial court took sufficient steps to insure that the defense was not prejudiced by these discovery violations. Id. at 1138, 1139. The court found that the trial court's exercise of its

discretion, when faced with these discovery problems was proper, Id.

The undersigned notes that the Due Process Clause of the Fourteenth Amendment of the United States Constitution does not provide a criminal defendant the right to discovery. Weatherford v. Bursey, 429 U.S. 545, 559, 97 S.Ct. 837, 51 L.Ed.2d 30 (1977). In addition, perceived errors in state procedure or law do not give rise to federal habeas corpus relief. See, Pulley v. Harris, 79 L.Ed.2d at 35; Barclay v. Florida, 79 L.ed.2d at 1144-45, n.8; Davis v. Wainwright, 547 F.2d 261 (5th Cir. 1977). Thus, the allegations presented in this claim do not warrant relief under Section 2254.

N. Arbitrary and Discriminatory Aspects of the Death Penalty as Administered in Florida.

In this stated ground for federal

habeas corpus relief, the petitioner contends that the death penalty in Florida is imposed in an arbitrary, capricious and discriminatory manner violative of the Eighth and Fourteenth Amendments of the United States Constitution. The petitioner alleges that the Florida death sentences are based upon factors precluded from consideration by the Florida Death Penalty Statute and the United States Constitution. The petitioner notes such factors as race, wealth, sex, prior relationship between the defendant and victim, and geographic location of the offense.

The undersigned finds these contentions to be wholly without merit. Conclusory allegations that the death penalty is being exacted in an arbitrary and discriminatory manner "do not constitute sufficiently compelling reasons for district court intrusion." Spinkellink v. Wainwright, 578

F.2d 582 (5th Cir. 1978). The general studies noted and submitted by the petitioner do not reveal intentional discrimination directly relevant to the petitioner's case. See, Sullivan v. Wainwright, 721 F.2d 316, 317 (11th Cir. 1983). In addition, there is no indication that the death penalty is unsuited in this particular case. See, Henry v. Wainwright, 721 F.2d at 998. Thus, this claim fails to state a basis upon which habeas corpus relief can be granted.

O. The Means of Execution in Florida.

In his final ground for Section 2254 relief, the petitioner contends that the means by which the death penalty will be administered to the petitioner, i.e., electrocution, "inflicts wanton and unnecessary torture and torment upon him, in violation of his rights guaranted by the

Eighth and Fourteenth Amendments of the United States Constitution." Petitioner's Brief in Support of Petition at 55.

The Eighth Amendment of the United States Constitution forbids the "unnecessary and wanton infliction of pain." Gregg v. Georgia, 428 U.S. 153, 173, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976) (citations omitted). Electrocution, however, has been found not to constitute cruel and unusual punishment. Spinkellink v. Wainwright, 578 F.2d at 616. Therefore, the petitioner's claim is without merit.

Title 28, U.S.C. § 636 and Local Rule 27(B) of this court permits any party to object to these proposed findings, recommendation or report within ten (10) days after being served with a copy thereof. Any objections shall be in writing and shall specifically identify the portions of the proposed findings, recommendations or

report to which objection is made and the basis for such objections.

Any objections shall be filed with the clerk of the court and copies served on the magistrate and all other parties. Any party may respond to another party's objections within ten (10) days after being served with a copy thereof. Failure to object to this report and recommendation prior to the district court's acceptance and adoption of the report and recommendation limits the scope of appellate review of factual findings. U.S. v. Warren, 687 F.2d 347 (11th Cir. 1982); Hardin v. Wainwright, 678 F.2d 589 (5th Cir., Unit B, 1982); Nettles v. Wainwright, 656 F.2d 986 (5th Cir. 1981).

In view of the above it is now respectfully

RECOMMENDED:

1. The petitioner's motion for supple-

mentation of recruel and unusual punishment. Spinkellink v. Wainwright, 578 F.2d at 616. Therefore, the petitioner's claim is without merit.

Title 28, U.S.C. § 636 and Local Rule 27(B) of this court permits any party to object to these proposed findings, recommendation or report within ten (10) days after being served with a copy thereof. Any objections shall be in writing and shall specifically identify the portions of the proposed findings, recommendations or report to which objection is made and the basis for such objections.

Any objections shall be filed with the clerk of the court and copies served on the magistrate and all other parties. Any party may respond to another party's objections within ten (10) days after being served with a copy thereof. Failure to object to this report and recommendation

prior to the district court's acceptance and adoption of the report and recommendation limits the scope of appellate review of factual findings. U.S. v. Warren, 687 F.2d 347 (11th Cir. 1982); Hardin v. Wainwright, 678 F.2d 589 (5th Cir., Unit B, 1982); Nettles v. Wainwright, 656 F.2d 986 (5th Cir. 1981).

In view of the above it is now respectfully

RECOMMENDED:

1. The petitioner's motion for supplementation of record should be denied.

2. The petition for writ of habeas corpus filed pursuant to the provisions of Section 2254, Title 28, United States Code, should be denied.

3. The petitioner's application for a stay of execution should be denied.

4. The clerk of the court should be directed to enter judgment accordingly.

At Pensacola, Florida, this 5th day of March, 1985.

ROBERT L. CRONGEYER, JR.
ROBERT L. CRONGEYER, JR.
United States Magistrate

IN THE UNITED STATES DISTRICT
COURT NORTHERN DISTRICT OF
FLORIDA PENSACOLA DIVISION

VERNON RAY COOPER,

Petitioner,

v. PCA 84-4144-RV

LOUIE L. WAINWRIGHT, et al.,

Respondents.

ORDER

This case is before the Court upon a petition for writ of habeas corpus, filed pursuant to the provisions of Title 28, United States Code, Section 2254, in which the petitioner challenges the legitimacy of his conviction for first degree murder and the death sentence imposed upon him. The matter is now ripe for a decision upon the Magistrate's Report and Recommendation, dated March 5, 1985. All parties have been previously furnished copies of the Magistrate's Report and Recommendation,

dated March 5, 1985. All parties have been previously furnished copies of the Magistrate's Report and Recommendation, and both the petitioner and respondent Wainwright have filed objections thereto, pursuant to Title 28, United States Code, Section 636(b)(1).

The Court having considered the Magistrate's Report and Recommendation, and the objections thereto filed by the parties, it is now determined that the Report and Recommendation should be adopted, subject, however, to the following clarification:

The Report and Recommendation discusses all fifteen grounds, labeled "A" through "O," raised by the petitioner. The Magistrate recognized, however, that petitioner's grounds "A," "B," "C," "D," "F," "J," "K," "L," and "N" are claims that "might generally be barred from habeas corpus review based upon the petitioner's

procedural default." Nevertheless, the Magistrate considered the merits of each individual claim set out by the petitioner, "recognizing the seriousness of this matter as well as the burdensome nature of death penalty appeals." I find that, for purposes of the Report and Recommendation, it was proper for the Magistrate to consider the merits of each individual claim, since the issue of procedural default is not always clearly defined. I specifically adopt the Magistrate's findings as to these issues, but find that each of these issues is controlled by Wainwright v. Sikes, 433 U.S. 72 (1977); Engle v. Isaac, 456 U.S. 107 (1982); and the recent Eleventh Circuit decisions in Palmes v. Wainwright, 725 F.2d 1511, 1524-26 (11th Cir. 1984) and Hall v. Wainwright, 733 F.2d 766, 777 (11th Cir. 1984).

It is, therefore, ORDERED as follows:

(1) The Magistrate's Report and Recommendation, as clarified above, is hereby adopted and incorporated by reference in this order of the Court.

(2) Petitioner's motion for supplementation of the record is hereby DENIED.

(3) The petitioner for writ of habeas corpus, filed pursuant to the provisions of Title 28, United States Code, Section 2254, is hereby DENIED for the reasons set forth in the Report and Recommendation.

(4) Petitioner's application for a stay of execution is also DENIED, consistent with the Court's decision regarding the writ of habeas corpus.

(5) The Clerk of the Court is directed to enter judgment accordingly.

DONE AND ORDERED this 20th day of June, 1985.

ROGER VINSON
ROGER VINSON
United States District Judge

A-101

Vernon Ray COOPER,

Petitioner-Appellant,

v.

Louie L. WAINWRIGHT, Secretary, Florida Department of Offender Rehabilitation, and C.S. Strickland, Superintendent, Florida State Prison at Starke, Florida, Respondents-Appellees.

No. 85-3583.

United States Court of Appeals,
Eleventh Circuit.

Dec. 19, 1986.

State prisoner convicted of robbery and first-degree murder, for which he received death penalty, sought federal habeas corpus relief. The United States District Court for the Northern District of Florida, No. 84-4144-RV, C. Roger Vinson, J., denied petition, and prisoner appealed. The Court of Appeals, Tjoflat, Circuit Judge, held that: (1) State Supreme Court reached merits of petitioner's claim that state trial court unconstitutionally precluded petitioner from presenting mitigating evidence at sentencing proceeding, and (2) prisoner was entitled to evidentiary hearing as to whether exclusion of evidence affected outcome of sentencing proceeding.

Affirmed in part, vacated in part and remanded.

1. Homicide 354

Trial judge's conclusion that defendant had premeditated design to kill was consistent with jury's verdict and evidence, and thus met requirement that death penalty not be imposed on one who participates in felony without intending to join, or joining, murder that occurs in course of felony.

2. Habeas Corpus 25.1(6)

Federal Court of Appeals reviewing habeas corpus petition alleging ineffective assistance of counsel must accord great deference to counsel's performance. U.S. C.A. Const.Amend. 6

3. Habeas Corpus 45.3(1.30)

Federal habeas court must respect legitimate state procedural rules that require criminal defendant seasonably to present his allegations of error, both at trial and on appeal, so that state court can consider and rule on them.

4. Habeas Corpus 45.3(1.50)

Just as federal court can decide an otherwise waived issue if state court excuses procedural default, state court's decision to raise and answer constitutional question sua sponte will also permit subsequent federal habeas review.

5. Habeas Corpus 45.3(9)

Florida Supreme Court had opportunity to rule on habeas petitioner's claim that

trial court wrongly excluded certain nonstatutory mitigating evidence, and in fact did rule on claim n petitioner's direct appeal of murder conviction, and thus, federal habeas court was required to review alleged constitutional violation, where Florida Supreme Court had stated that introduction of nonstatutory mitigating evidence threatened proceeding with undisciplined discretion condemned by United States Supreme Court.

6. Habeas Corpus 90.2(1)

Habeas petitioner was entitled to evidentiary hearing as to whether mitigating evidence he had proffered at his state murder trial was probative and, if so, whether its omission would have affected outcome of his sentencing proceeding, where state trial court had eroneously excluded mitigating evidence regarding petitioner's prior employment, marital plans, and accomplice's influence over him.

Appeal from the United States District Court for the Northern District of Florida.

Before TJOFLAT, VANCE and KRAVITCH, Circuit Judges.

TJOFLAT, Circuit Judge:

The principal question presented on this appeal is whether the district court properly applied the doctrine of Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977), and Murray v. Carrier, ____ U.S. ____, 106 S.Ct. 2639, 91

L.Ed.2d 397 (1986), in holding that petitioner is barred from obtaining federal habeas corpus relief on his claim that the trial court unconstitutionally excluded non-statutory mitigating evidence from his capital sentencing proceeding. We conclude that the doctrine of Sykes and Carrier does not bar a review of the merits of petitioner's claim, and we remand the claim for an evidentiary hearing.

I.

In 1974, a jury in the circuit court of Escambia County, Florida, convicted Vernon Ray Cooper, the petitioner, of robbery and first-degree murder.[1] The State sought the death penalty for the murder conviction, and the trial court conducted a second jury proceeding to determine the jury's recommendation as to that sentence.[2] During

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[1] The facts of this case are set forth in Cooper v. State, 336 So.2d 1133, 1136 (Fla.1976) (per curiam), cert.denied, 431 U.S. 925, 97 S.Ct. 2200, 53 L.Ed.2d 239 (1977).

[2] In capital cases, Florida statutory law provides for separate guilt and penalty stages. After convicting a defendant of a crime, the jury hears evidence and recommends to the trial court a sentence of life imprisonment or of death. The jury may recommend a sentence of death if it finds that "sufficient aggravating circumstances exist as enumerated" in the death penalty statute, but neither a jury

this proceeding, petitioner's counsel attempted to introduce several items of mitigating evidence, including: (1) petitioner's prior employment; (2) evidence of petitioner's marital plans; and (3) the influence petitioner's accomplice, Stephen Ellis,[3] exercised over petitioner in the commission of the robbery and murder. The trial judge, admitting that he and the attorneys were "plowing a new field," sustained the State's objection to such evidence, concluding that it was irrelevant to the mitigating circumstances prescribed in the death penalty statute as grounds for not imposing the death penalty.[4]

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decision of life imprisonment nor of death is binding upon the trial court. See Fla.Stat. § 921.141(1973).

[3] Ellis was killed during an exchange of gunfire with the police, who attempted to capture him and petitioner following their robbery of a grocery store.

[4] § 921.141 lists seven mitigating circumstances:

(6) MITIGATING CIRCUMSTANCES.- Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another

The jury recommended that petitioner receive the death sentence, and the trial court, following its recommendation, imposed that sentence. Petitioner appealed, claiming various errors in the guilt and penalty phases of his trial, among them the trial court's refusal to allow petitioner to introduce the three items of mitigating evidence listed above. Petitioner contended that the third item of mitigating evidence, concerning Ellis' influence over him, was admissible to establish the mitigating circumstance enumerated in Fla.Stat. § 921.141(6)(d) (1973), which states that a defendant's "relatively minor" participation in a "capital felony committed by another person" shall be a mitigating circumstance. The State, in response, argued that the proffered item of evidence was insufficient to establish this statutory mitigating circumstance.

With respect to the first two items of mitigating evidence, which petitioner conceded did not relate to any mitigating circumstance enumerated in section

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person and his participaton was relatively minor.

(e) The defendant acted under extreme duress or under the sustantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirement of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

921.141(6), petitioner contended in his brief that they were nevertheless admissible because "[t]he underlying rationale of the death penalty is that an individual has shown by their [sic] actions that they [sic] are beyond rehabilitation. It was error not to allow the Appellant to present evidence that he was not beyond rehabilitation."[5] The State responded that the trial court correctly excluded these items of evidence because they did not tend to establish any of the mitigating circumstances contained in section 921.141(6).[6]

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[5] Petitioner used a similar argument in his reply brief:

> It does not make sense that the most petty thief can have a free hand in presenting mitigating evidence to the court and in fact the court must allow them [sic] to do so while a man fighting for his life cannot present such evidence .... Since the theory of the death penatly is that this is the only recourse for killers who cannot be rehabilitated, evidence as to the Appellant's potential for rehabilitation was certainly relevant.

[6] Because petitioner's contention that the trial court unconstitutionally rejected his proffered evidence of nonstatutory mitigating circumstances is essentially the same claim the Supreme Court decided in Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) (plurality), we shall refer to petitioner's argument as a "Lockett claim," despite the fact that Lockett was decided after petitioner's

The Supreme Court of Florida, in Cooper v. State, 336 So.2d 1133 (Fla.1976) (per curiam), cert.denied, 431 U.S. 925, 97 S.Ct. 2200, 53 L.Ed.2d 239 (1977) [hereinafter Cooper I], affirmed petitioner's convictions and death sentence. The court held that the trial court properly excluded the proffered evidence because it was unrelated to any of the statutorily enumerated mitigating circumstances, implicitly holding that the United States Constitution forbade the introduction of such mitigating evidence:

> The sole issue in a sentencing hearing under Section 921.141, Florida Statutes (1975), is to examine in each case the itemized aggravating and mitigating circumstances. Evidence concerning other matters have no place in that proceeding any more than purely speculative matters calculated to influence a sentence through emotional appeal. Such evidence threatens the proceeding with the undisciplined discretion condemned in Furman v. Georgia.

Cooper i, 336 So.2d at 1139 (citation and footnote omitted). The court further stated that "the Legislature chose to list the mitigating circumstances which it judged to be reliable for determining the appropriateness of a death penalty. . . and we are not free to expand the list." Id. (footnote omitted.).[7]

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trial and direct appeal.

[7] In Songer v. State, 365 So.2d 696

Two years after petitioner lost his direct appeal in the state supreme court, the United States Supreme Court announced its holding in Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) (plurality). Recognizing that the constitutional application of the death penalty was an amorphous area of the law, the Court provided at least one bright line rule:

> the sentencer, in all but the rarest kind of capital case [can]not be precluded form considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.

Id. at 604, 98 S.Ct. at 2964-65 (footnotes omitted).

In 1979, following the Lockett decision, petitioner sought collateral

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(Fla.1978) (per curiam) cert.denied, 441 U.S. 956, 99 S.Ct. 2185 (1979), the Supreme Court of Florida stated that Florida's death penalty law did not, and had never, required that the trial courts exclude nonstatutory mitigating evidence. Both the Supreme Court of Florida and this court, however, have recognized that some Florida courts could have "misconstrued" the statute and unconstitutionally restricted the jury's access to mitigating evidence the defendant proffered. See Songer v. Wainwright, 769 F.2d 1488, 1489 (11th Cir. 1985) (en banc) (per curiam); Perry v. State, 395 So.2d 170, 174 (Fla. 1981).

relief in the state trial court pursuant to Fla.R.Crim.P. 3.850.[8] Petitioner reiterated his claim, made on direct appeal, that the court had erred in excluding his proffered mitigating evidence, and contended that "the trial court violated the dictates of Lockett by unduly restricting the introduction of evidence relevant to nonstatutory mitigating circumstances." Cooper v. State, 437 So.2d 1070, 1071 (Fla.1983) (per curiam), cert.denied, 464 U.S. 1073, 104 S.Ct. 986, 79 L.Ed.2d 221 (1984) [hereinafter Cooper II]. The State's brief responded to the merits[9] of petitioner's Lockett claim and argued that the evidence petitioner proffered at trial did not constitute mitigating evidence. The trial court denied petitioner's claim on the merits.

Petitioner appealed to the Supreme Court of Florida. That court refused to consider the merits of his Lockett claim because it viewed the claim as procedurally barred. According to the supreme court,

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[8] Petitioner raised several claims in addition to his Lockett argument in his Rule 3.850 motion. Only his Lockett and three of the other claims are before this court. See infra text accompanying note 11.

[9] On appeal, too, the State urged the supreme court to reject petitioner's claim on the merits, observing that the same claim had been "raised and rejected" by the supreme court in petitioner's direct appeal from his convictions and death sentence.

> [i]n his initial appeal from his conviction and sentence, [petitioner] raised the question of whether certain evidence he had proffered was probative and relevant to the statutory mitigating factors, and we answered this question in the negative. He now attempts again to raise the issue of relevancy of this evidence but on a different basis than originally argued in his direct appeal.

Id. at 1071. Having declared that petitioner's direct appeal presented only a statutory and not a constitutional claim, the court held that petitioner could not now attack his sentence on Lockett grounds.[10] See id. at 1071-72.

Petitioner next brought this habeas corpus action in the district court. He

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[10] Unless a convicted offender seeks relief on the basis of a significant change in the law, Florida Rule of Criminal Procedure 3.850 does not allow his collaterally to attack his conviction or sentence if he raised, or could have raised, his objection on direct appeal. See, e.g., Tafero v. State, 459 So.2d 1034, 1035 (Fla. 1984) (claim based on significant change in the law is cognizable in post-conviction proceedings); Zeigler v. State, 452 So.2d 537, 539 (Fla.1984) (claims presented on appeal not cognizable under Rule 3.850); Armstrong v. State, 429 So.2d 287, 288 (Fla.) (per curiam) (same), cert.denied, 464 U.S. 865, 104 S.Ct. 203, 78 L.Ed.2d 177 (1983).

presented four claims in his petition, each of which has been exhausted[11]: (1) he could not receive the death penalty, because the jury did not find that he intended to kill the victim, as required by Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982); (2) he received ineffective assistance of counsel from his court-appointed attorney during the penalty phase of his trial, in violation of the sixth and fourteenth amendments; (3) the Supreme Court of Florida, in reviewing petitioner's death sentence, failed to consider the mitigating evidence petitioner proffered to the trial court; and (4) the trial court erred, under Lockett, in rejecting such mitigating evidence. The district court declined to hold an evidentiary hearing on any of petitioner's claims and rejected them on the merits. The court rejected petitioner's Lockett claim on procedural grounds as well, citing Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977). This appeal followed.

[1,2] We agree with the district court, for the reasons stated in the margin, that petitioner's first three claims are meritless.[12] We find, however,

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[11] See 28 U.S.C. § 2254(b) (1982).

[12] Petitioner's claim that the jury did not find that he was sufficiently culpable to allow the imposition of the death penalty is foreclosed by Cabana v. Bullock, ____ U.S. ____, 106 S.Ct. 689, 88 LEd.2d 704 (1986). In petitioner's case,

that his fourth claim is not barred by

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the trial judge's conclusion that petitioner had a "premeditated design to kill" is consistent with the jury's verdict and the evidence, and thus meets the requirement of Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982), that the death penatly not be imposed on one who participates in a felony without intending to join, or joining, a murder that occurs in the course of the felony. See Cabana, ____ U.S. at ____, 106 S.Ct. at 696-98. Petitioner's claim that he received ineffective assistance of counsel during the penalty phase of his trial is also without merit. A criminal defendant is entitled to an attorney whose assistance is "reasonable considering all the circumstances," and we must accord great deference to counsel's performance. See Strickland v. Washington, 466 U.S. 668, 688-89, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674 (1984). Having examined the record, we conclude that petitioner did not receive unconstitutionally ineffective assistance of counsel. Finally, petitioner's claim that the Supreme Court of Florida failed adequately to review his death sentence on direct appeal because it did not consider the non-statutory mitigating evidence he proffered at trial merely restates his Lockett claim. If petitioner is able to show that the evidence he sought to introduce at trial is credible, then he may be entitled to a new sentencing trial. If petitioner is unable to make this showing, then the supreme court's refusal to consider non-credible evidence cannot have prejudiced petitioner.

Sykes and its progeny, and deserves an evidentiary hearing. If the mitigating evidence that petitioner proffered at trial, and cites in his petition, is probative, he may be entitled to a new sentencing hearing in state court.

II.

A.

[3] In addressing petitioner's Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) (plurality) claim, we must first determine whether the doctrine announced in Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977), and Murray v. Carrier, ____ U.S. ____, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986), bars our review of the merits of petitioner's claim. That doctrine requires a federal habeas corpus to respect legitimate state procedural rules that require a criminal defendant seasonably to present his allegations of error-both at trial and on appeal-so that the state court can consider and rule on them. The State urges us to apply the doctrine here because petitioner (1) allegedly failed to present his Lockett claim to the Supreme Court of Florida when challenging his death sentence on direct appeal, as required by the rules governing Florida appellate practice, and (2) the supreme court accordingly refused to consider his claim on the merits. The State cites the supreme court's observation in Cooper II-that petitioner did not present his Lockett claim in Cooper I-as evidence of both these facts. We need not consider whether petitioner presented his

Lockett claim in Cooper I with adequate precision, because we are satisfied that the supreme court recognized and passed on the claim in that appeal.

In Sykes, the Supreme Court held that federal habeas courts must honor state contemporaneous objection rules, when enforced by the state courts, and must decline to review on the merits claims that the state treats as barred, absent a showing of cause for noncompliance with such rules and resulting prejudice. See Sykes, 433 U.S. at 90-92, 97 S.Ct. at 2508-09. In Carrier, the court extended the Sykes rationale to a defendant's noncompliance with state appellate rules. Both Sykes and Carrier reflect the same considerations of comity and judicial efficiency. By respecting state procedural rules, federal courts prevent "sandbagging," promote finality, and allow state courts the opportunity to add their wisdom to the interpretation of the Constitution. See Carrier, ____ U.S. at ____, 106 S.Ct. at 2647-48; Sykes, 433 U.S. at 88-90, 97 S.Ct. at 2507-08; Spencer v. Kemp, 781 F.2d 1458, 1472-73 (11th Cir. 1986) (en banc) (Tjoflat, J., specially concurring). Because both Sykes and Carrier require respect for state procedural rules as a means of furthering these policies, and not as a goal in itself, a federal court may sometimes reach the merits of a claim even when the petitioner has not fully complied with state rules. Thus, if the state interests behind a procedural rule are vindicated regardless of whether a federal court decides an issue on its merits, the federal court can decide the question yet remain faithful to Sykes and its progeny.

See Spencer, 781 F.2d at 1473-74 (Tjoflat, J., specially concurring).

One instance in which a federal court may reach the merits of a habeas claim, notwithstanding procedural default, is when the state court ignores the default and decides the merits of the claim. We have held, for example, that if a state court chooses to ignore a defendant's failure to abide by a contemporaneous objection rule, the federal courts may reach the merits of the substantive claim. See Henry v. Wainwright, 686 F.2d 311, 313 (5th Cir. Unit B 1982), vacated on other grounds, 463 U.S. 1223, 103 S.Ct. 3566, 77 L.Ed.2d 1407 (1983).[13] Given the polices underlying Sykes and Carrier, this result is ineluctable. When a state court decides a constitutional question, even though it does not have to, it necessarily holds that the policies underpinning its procedural rule are unworthy of vindication under the particular circumstances of the case before it. Furthermore, once the state court reaches the merits on a constitutional claim, the comity that Sykes and Carrier encourage is served, regardless of whether a federal court also reaches the merits of the claim.

[4] Just as a federal court can decide an otherwise waived issue if the state

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13 In Stein v. Reynolds Securities, Inc., 667 F.2d 33 (11th Cir. 1982), this court adopted as binding precedent all decisions of Unit B of the former Fifth Circuit handed down after September 30, 1981.

court excuses the procedural default, a state court's decision to raise and answer a constitutional question sua sponte will also permit subsequent federal habeas review. There, as in the above example, the state court again is determining that the policies its procedural rules enfoce do not require vindication in a particular case. Comity, too, is served in this situation; when a state court recognizes the presence of a constitutional question, and chooses to analyze and answer the problem, it serves the Sykes and Carrier policy that state courts should be encouraged to participate in the process of constitutional adjudication.

[5] In the case before us, the State claims that petitioner is procedurally barred from obtaining habeas relief on his Lockett claim because he failed to raise it on direct appeal from his convictions and sentence. To determine the strength of the State's position, we may look not only at petitioner's brief on appeal, to see whether he adequately presented his Lockett claim, but also at the Supreme Court of Florida's opinion in Cooper I. Because a state court is always free to notice constitutional error sua sponte, as it often does, petitioner's alleged failure to present his Lockett claim to the Supreme Court of Florida does not necessarily mean that the court did not reach it. If that court did reach the merits of petitioner's claim, then a federal habeas court must review the alleged constitutional violation. See Henry, 686 F.2d at 313. In this case, we find that the Supreme Court of Florida had the opportunity to rule on petitioner's claim, and that it did so in

Cooper I.[14]

In Cooper I, petitioner argued that the trial court had wrongly excluded certain non-statutory mitigating evidence. In response, the supreme court stated that "[s]uch [non-statutory mitigating] evidence threatens the proceeding with the undisciplined discretion condemned in Furman v. Georgia." Cooper I, 336 So.2d at 1139 (citation and footnote omitted). This statement indicates to us that the supreme court was aware of, and addressed, the constitutional implications of petitioner's claim. The court's statement makes it clear that it read Supreme Court precedent as forbidding the introduction of non-statutory mitigating evidence, acknowledging that its reading "may appear to be narrowly harsh, but under Furman undisciplined discretion is abhorrent whether

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[14] Because we conclude that the Supreme Court of Florida reached the merits of petitioner's claim, we need not decide whether the record before us demonstrates that petitioner also "presented" his Lockett claim on direct appeal. As we discuss infra text accompanying note 16, petitioner placed at least some elements of his claim before the court and clearly did not attempt to engage in "sandbagging." Whether petitioner's claim was specific enough to have been fairly presented to the Supreme Court of Florida is an issue we need not decide, because even a sua sponte state court decision is sufficient to allow a federal hebeas court to reach the merits of the claim.

operating for or against the death penalty." Id. at 1139 n. 7. Necessarily, therefore, the Supreme Court of Florida held that the converse of its statement could not also be true; it read the Constitution as not mandating the admissibility of nonstatutory mitigating evidence.

We thus conclude that the Supreme Court of Florida decided the specific question later raised in Lockett, and consequently reached the merits of the claim petitioner now presents. Our conclusion is bolstered by documents contained in the record. They demonstrate that even if petitioner failed properly to present his Lockett claim to the Supreme Court of Florida, [15] he at least provided that court with some of the elements of a constitutional argument. To us, petitioner's presentation of elements of a constitutional argument indicates that the court's reliance on Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) was not just an errant citation, but rather the result of a thoughtful decision-making process.

The record before us includes several items showing that petitioner at least alluded to his Lockett claim when he challenged his death sentence in Cooper O. First, as we stated in Part I, petitioner's brief presented two theories for the admissibility of his nonstatutory mitigating evidence. One theory was that Florida's death penatly statute authorized the introduction of the evidence concerning

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15 See supra note 14.

Ellis' relationship with petitioner.[16] The other was that "[t]he underlying rationale of the death penalty" required the admission of nonstatutory mitigating evidence. Although the Supreme Court of Florida, in Cooper II, retrospectively read petitioner's latter claim of error to be statutorily based, see Cooper II, 437 So.2d at 1071, we find its reading unconvincing.

Second, although arguments made to one court are not necessarily reliable indicators of what arguments parties may have made to another court, we find petitioner's application to the Supreme Court for a writ of certiorari, and the State's response, to be of value in determining whether the Supreme Court of Florida decided petitioner's Lockett claim in Cooper I. In his application, petitioner explicitly based his challenge to the trial court's exclusion of mitigating evidence on the eighth and fourteenth amendments. The State's brief responded that petitioner's claim of an unconstitutionally conducted sentencing trial was "patently without merit, and the Florida Supreme Court properly so concluded." For similar reasons, we find the State's brief to the Supreme Court of Florida in petitioner's Rule 3.850 proceeding claim to be relevant. In its brief, the State argued that petitioner had raised and lost his constitutional claim on direct appeal.[17] The

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16 See supra Part I.

17 The State correctly points out that following Cooper II, in his petition for

State's contention, albeit further removed in time from petitioner's criminal prosecution and direct appeal, demonstrates again to us that the parties, at least, shared an understanding that on direct appeal they had litigated the constitutionality of the trial court's exclusion of petitioner's mitigating evidence.

In sum, we conclude that petitioner's claim that the trial court unconstitutionally limited his opportunity to present mitigating evidence is properly before this court for a decision on the merits. We now analyze that claim.

III.

Petitioner contends that the trial court unconstitutionally refused to allow him to introduce mitigating evidence at the penalty stage regarding his prior employment, his marital plans, and Ellis' influence over him. He now seeks a new sentencing hearing, claiming that Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) (plurality), Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 102 S.Ct. 869,

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certiorari to the United States Supreme Court, petitioner argued that he should be excused from failing to raise his Lockett claim on direct appeal because that case was unforeseeable. In light of the Supreme Court of Florida's decision in Cooper II, however, and in context with the rest of his petition for certiorari, we find this statement a less significant concession than does the State.

71 L.Ed.2d 1 (1982), and Skipper v. South Carolina, ____ U.S. ____, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986), stand for the proposition that a defendant in a capital case has a constitutional right to present any relevant and competent mitigating evidence to the sentencer. Skipper and Eddings merely refined the Lockett rule, which petitioner's argument accurately reflects. Because this court has held that Lockett is to be applied retroactively, see Songer v. Wainwright, 769 F.2d 1488, 1489 (11th Cir.1985) (en banc) (per curiam), petitioner may be entitled to a writ of habeas corpus if he can prove that the trial court's exclusion of mitigating evidence prejudiced him.

[6] The mitigating evidence petitioner proffered at trial, and cites in his habeas petition, may entitle him to a new sentencing trial. Whether such evidence is probative and, if so, whether its omission may have affected the outcome of petitioner's sentencing proceeding, is an issue that we cannot resolve; it is a matter for the district court. See Hitchcock v. Wainwright, 770 F.2d 1514, 1517 (11th Cir. 1985) (en banc) (evidentiary hearings generally preferable in habeas cases raising Lockett claims), cert. granted, ____ U.S. ____, 106 S.Ct. 2888, 90 L.Ed.2d 976 (1986). We therefore vacate the district court's judgment and ramand this case for an evidentiary hearing on petitioner's Lockett claim. In all other respects, the judgment is affirmed.

AFFIRMED in part; VACATED in part, and REMANDED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 85-3583

VERNON RAY COOPER,

Petitioner-Appellant,

versus

LOUIE L.WAINWRIGHT, Secretary, Florida Department of Offender Rehabilitation, and C.S. STRICKLAND, Superintendent, Florida State Prison at Starke, Florida,

Respondents-Appellees.

Appeal from the United States District for the Northern District of Florida

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ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion December 19, 1986, 11 Cir., 198_, ____F.2d____).
(January 27, 1987)

Before TJOFLAT, VANCE and KRAVITCH, Circuit Judges

PER CURIAM;

(X) The Petition for Rehearing is DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh

Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Reharing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the jCircuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT;

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United States Circuit Judge